CITY OF SANTA MONICA
LANE DILG, SBN 277220
City Attorney
Lane.Dilg@smgov.net
GEORGE CARDONA, SBN 135439
Special Counsel
George.Cardona@smgov.net
1685 Main Street, Room 310
Santa Monica, CA 90401
Telephone: 310.458.8336

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR., SBN 132099
tboutrous@gibsondunn.com
MARCELLUS MCRAE, SBN 140308
mmcrae@gibsondunn.com
WILLIAM E. THOMSON, SBN 187912
wthomson@gibsondunn.com
KAHN SCOLNICK, SBN 228686
kscolnick@gibsondunn.com
TIAUNIA HENRY, SBN 254323
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Defendant
CITY OF SANTA MONICA

Gov. Code, § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA;

Plaintiffs,

v.

CITY OF SANTA MONICA,

Defendant.

CASE NO. BC 616804

DEFENDANT'S *EX PARTE* APPLICATION (A) TO CONFIRM THAT PARAGRAPH 9 OF THE FEBRUARY 13, 2019 JUDGMENT IS A MANDATORY INJUNCTION AND THUS STAYED PENDING APPEAL; OR (B) IN THE ALTERNATIVE, TO STAY, PENDING APPEAL, THE ENFORCEMENT OF PARAGRAPH 9

HEARING:
Date: March 1, 2019
Time: 8:30 am
Dept: 9

Action Filed: April 12, 2016
Trial Date: August 1, 2018

Assigned to Hon. Yvette M. Palazuelos

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 1, 2019, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 9 of the above-titled Court, located at 312 N. Spring St., Los Angeles, 90012, Defendant City of Santa Monica will, and hereby does, apply *ex parte* to this Court for an order (a) confirming that paragraph 9 of the Court's February 13, 2019 judgment, although arguably prohibitory in form, is mandatory in effect, such that it was automatically stayed by the City's filing of its Notice of Appeal on February 22, 2019; or (b) in the alternative, staying the enforcement of paragraph 9 of the judgment pending the City's appeal. This Application is made pursuant to California Rules of Court, rule 3.1200 et seq.

Paragraph 9 of the judgment prohibits Council members from serving after August 15, 2019, unless they were "elected to the Santa Monica City Council through a district-based election in conformity with this Judgment." As the City can be governed only by its Council, if paragraph 9 were enforced during the City's appeal, it would effectively coerce the City into holding a district-based election using the map proposed by the plaintiffs and approved by the Court before August 15, 2019, while the appeal is pending. In other words, paragraph 9 is mandatory in effect because its enforcement would compel the City to implement mandatory aspects of the judgment that are unquestionably stayed during the City's appeal—specifically, the requirement that the City hold a district-based election this summer.

Plaintiffs and their counsel have taken the position that paragraph 9 of the judgment is prohibitory and thus would not be stayed during the appeal. Accordingly, the City seeks an order confirming that the enforcement of paragraph 9 will be stayed until such time as the City's appellate rights are exhausted.

The City raises this issue in an *ex parte* application, rather than a regularly noticed motion, because this Court's August 15, 2019, deadline—if not stayed during the appeal—would require the City to hold a special City Council election in July of this year. To comply with the notice requirements of the Elections Code, the City would need to initiate the elections process promptly, within the coming weeks. Thus, ex parte relief is necessary in order to avoid the uncertainty and confusion that would be caused absent either clarification that enforcement of paragraph 9 was

automatically stayed by the City's appeal or, in the alternative, a discretionary stay of the enforcement of paragraph 9 pending the appeal.

This Application is based upon: (1) this Notice of Application and Application; (2) the accompanying Memorandum of Points and Authorities; (3) the concurrently filed Declaration of Kahn Scolnick and attached exhibits; (4) the concurrently filed Declaration of Denise Anderson-Warren, Clerk of the City of Santa Monica, and the attached exhibit; (5) the concurrently filed Declaration of Professor Jeffrey Lewis; (6) all the pleadings, records, and papers on file in this action; (7) everything of which the Court may take judicial notice under sections 451, 452, and 453 of the California Evidence Code; and (8) upon such other evidence and argument of counsel as the Court may permit at or before the hearing on this Application.

California Rule of Court, rule 3.1202(b) also requires the parties to indicate whether any similar *ex parte* applications have been refused in whole or in part. There have been no such applications.

Counsel for all parties were notified of this Application via email on February 27, 2019 at approximately 8:44 p.m. (Decl. of Kahn Scolnick, Ex. A.) Plaintiffs have indicated they intend to oppose it. Pursuant to rule 3.1202(a) of the California Rules of Court, the City lists counsel for the parties to this action, and their address and telephone number, as follows:

Kevin I. Shenkman — shenkman@sbcglobal.net
Mary R. Hughes — mrhughes@shenkmanhughes.com
John L. Jones — jjones@shenkmanhughes.com
SHENKMAN & HUGHES PC
28905 Wight Road
Malibu, California 90265
Telephone: (310) 457-0970
Attorneys for Plaintiffs

R. Rex Parris — rrparris@rrexparris.com
Jonathan Douglass — jdouglass@rrexparris.com
Ellery Gordon
Attorneys for Plaintiffs
PARRIS LAW FIRM
43364 10th Street West
Lancaster, California 93534
Telephone: (661) 949-2595
Facsimile: (661) 949-7524

Milton Grimes
LAW OFFICES OF MILTON C. GRIMES
3774 West 54th Street
Los Angeles, California 90043
Telephone: (323) 295-3023
miltgrim@aol.com
Attorney for Plaintiffs

Robert Rubin
LAW OFFICE OF ROBERT RUBIN
131 Steuart Street, Suite 300
San Francisco, California 94105
Telephone: (415) 625-8454
robertrubinsf@gmail.com
Attorney for Plaintiffs

DATED: February 28, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____

Theodore J. Boutrous, Jr.
Attorneys for Defendant
City of Santa Monica

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court's judgment, issued on February 13, 2019, mandates sweeping, fundamental changes to an electoral system that has been in place in the City of Santa Monica since 1946. Because the City contests many of the legal and factual premises of the judgment, on February 22, 2019, the City filed a notice of appeal. Paragraph 9 of the judgment prevents anyone not elected in a district-based election from serving on the City Council after August 15, 2019, thereby leaving the City with no choice but to hold a district-based election this summer. By this application, the City seeks clarification that paragraph 9 is effectively a mandatory injunction—and therefore is automatically stayed during the City's appeal. In the alternative, if the Court deems paragraph 9 to be prohibitory in nature and thus not automatically stayed on appeal, the City contends that the Court should exercise its discretion to stay the enforcement of paragraph 9 pending appeal.

Paragraphs 7 and 8 of the judgment are unquestionably mandatory in character, because they require affirmative action that would upset the status quo. In those paragraphs, the Court has commanded the City to hold district-based elections using the seven districts drawn by plaintiffs' expert and adopted by the Court, starting with a special election on July 2, 2019, to replace all seven members of the current Council. There is no dispute that this sort of mandatory injunctive relief is automatically stayed upon the taking of an appeal. (See, e.g., *Feinberg v. Doe* (1939) 14 Cal.2d 24, 28 ["It is . . . well established that a mandatory injunction is automatically stayed by the perfecting of an appeal and that thereafter the lower court is without jurisdiction to compel obedience to the order from which the appeal has been taken."].)

That leaves paragraph 9 of the judgment,[1] which prohibits anyone *not* elected in a district-based election from serving on the City Council beyond August 15, 2019. Although paragraph 9 is phrased in prohibitory language, courts are not "bound by the form of the [injunction] but will look to

---

[1] Paragraphs 5 and 6—which enjoin the City from holding or certifying the results of an at-large election in the future—are prohibitory in form, but there is no immediate need to address whether they are mandatory or prohibitory in effect. The next regularly scheduled City Council election is not until November 2020. The City reserves the right to seek further relief (either from this Court or the Court of Appeal) as to paragraphs 5 and 6, if necessary, during the appeal.

its substance to determine its real nature." (*Feinberg, supra,* 14 Cal.2d at p. 28.) This inquiry "does not depend on semantic characterizations." (*Union Pacific R.R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 158.)

The enforcement of paragraph 9 during the City's appeal would leave the City without a governing Council as of August 16, 2019. Because "[a]ll powers of the City shall be vested in the City Council" (Santa Monica City Charter, § 605), the City would effectively be rudderless and unequipped to govern itself as of that date. As a result, the City would have no choice but to elect seven new council members before August 15, 2019, in a district-based election, with the districts drawn by plaintiffs' expert and approved by the Court. And the only way to avoid the governance vacuum that would result from the ouster of the Council in mid-August would be to notice an election in the coming weeks, as California law requires at least 113 days' notice before an election is held. (See Elec. Code, § 12101.) Paragraph 9 therefore calls for the very same mandatory action—that the City hold a districted election this summer—that was unquestionably stayed by the City's filing of its notice of appeal. Put differently, if the enforcement of paragraph 9 were not stayed during the appeal, the judgment would coerce the City into upsetting the status quo by holding a district-based election in advance of August 15, 2019. Paragraph 9 therefore must be mandatory in character, even though it is "framed in prohibitory language, [because it] was intended to coerce or induce defendant into immediate affirmative action. . . ." (*Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 838.)

In the alternative, if the Court deems paragraph 9 to be prohibitory in character (and thus not automatically stayed), the Court should exercise its discretion to stay paragraph 9 pending the outcome of the City's appeal pursuant to Code of Civil Procedure section 918.

Absent a stay during the appeal, the City will suffer irreparable harm—including the threat of being left without *any* Council for some period of time—especially if the Court of Appeal ultimately reverses one or more aspects of the judgment. The City would be compelled to abandon a longstanding method of election that its voters have repeatedly approved at the polls. Holding a district-based election would necessarily entail the expenditure of time and money—almost one million dollars in direct cost to the City, not to mention the time and effort of the candidates who

would campaign under the new system. And the duly elected Council members who ran in 2016 and in 2018 will lose portions of the terms that the voters elected them to serve.

The public would suffer in numerous ways as well. Absent a stay of paragraph 9, voters would be asked to participate in a campaign season of questionable legality and effect. Santa Monica's residents have had no input whatsoever as to the shape or boundaries of the City's new districts, contrary to the requirements of the Elections Code. The Court-imposed districts cure no ills and create new ones, including the dilution of minority voting strength, as the City has explained and as it will demonstrate again on appeal. Should the Court of Appeal reverse the judgment—which is entirely possible, insofar as the City's appeal presents substantial issues of law, including several such issues that are questions of first impression in California's appellate courts—the City would then need to hold a new at-large election. Absent a stay, then, there is a real possibility of three elections in two years, which would undermine confidence and participation in the electoral system, lead to voter confusion, and possibly reduce civic engagement.

In sum, the Court should confirm that paragraph 9 of its judgment is a mandatory injunction in substance, and thus stayed on appeal. In the alternative, the Court should exercise its discretion to stay the effectiveness of paragraph 9 pending the City's exhaustion of appellate rights.

II. RELEVANT BACKGROUND

Plaintiffs filed this case in August 2016. The Court held a bench trial between August 1 and September 13, 2018.

On November 8, 2018, following the parties' submission of closing briefing, this Court issued a Tentative Decision in favor of plaintiffs on both their claims (under the California Voting Rights Act and under the Equal Protection Clause of the California Constitution). The Court ordered further briefing on the appropriate remedies, which the parties submitted in November 2018.

Plaintiffs applied *ex parte* on November 27, 2018, for a temporary restraining order to prevent the certification of the results from the City's November 2018 City Council election. The Court denied plaintiffs' application.

On December 12, 2018, the Court issued an Amended Tentative Decision in which the Court tentatively ruled: (a) the City may no longer hold at-large elections for its City Council, and (b) upon

the entry of a judgment, the City would be required to hold district-based elections in accordance with the single-district map identified as Exhibit 162-1, which the Court attached to its Amended Tentative Decision.

Plaintiffs then applied *ex parte* on January 2, 2019, seeking clarification that the Court had attached the wrong map to its Amended Tentative Decision—instead of the single district map in Exhibit 162-1, plaintiffs argued that the Court should have attached the seven-district map in Exhibit 261. The Court agreed with plaintiffs and ordered them to include in their Proposed Statement of Decision and Proposed Judgment a seven-district map and the requirement of a special election.

Plaintiffs submitted a Proposed Statement of Decision and Proposed Judgment on January 3, 2019. The City timely objected to both.

The Court issued its final Statement of Decision and Judgment on or about February 13, 2019. As relevant here:

- Paragraph 7 of the judgment orders the City to hold district-based elections for seats on its City Council going forward, in accordance with the seven-district map proposed by plaintiffs' expert;
- Paragraph 8 of the judgment mandates that the City hold a special district-based election on July 2, 2019; and
- Paragraph 9 of the judgment enjoins any person not elected by district-based elections from serving on the City Council after August 15, 2019.

The City timely appealed on February 22, 2019.

Before and after issuance of the judgment, plaintiffs and their counsel have taken the position that paragraph 9 would remain in effect during the City's appeal.[2] Accordingly, the City seeks relief

---

[2] (See, e.g., Madeleine Parker, City Loses Voting Rights Lawsuit, Santa Monica Daily Press (Feb. 15, 2019) *https://www.smdp.com/city-of-santa-monica-loses-voting-rights-lawsuit/172854* ["Kevin Shenkman, an attorney for the plaintiffs, said Santa Monica will no longer have a City Council by Aug. 16 if the City appeals the court's judgment because the final ruling stipulates that any councilmembers elected in at-large elections may not serve past Aug. 15. 'If the City disregards the court's judgment as it has threatened to, there will be consequences,' he said."].)

from this Court in the first instance in the hopes of avoiding the necessity of filing a petition for a writ of supersedeas in the Court of Appeal.

III. ARGUMENT

A. Paragraph 9 of the Judgment is Effectively Mandatory and Therefore Has Been Automatically Stayed by the City's Appeal.

Paragraph 9, which prohibits persons not elected in a district-based election from serving on the City Council after August 15, 2019, is prohibitory in form, but it is mandatory in effect. The Court should clarify as much by entering an order confirming that the enforcement of paragraph 9 is automatically stayed until such time as the City's appellate rights have been exhausted.[3]

1. Mandatory vs. Prohibitory Injunctions

"An appeal stays a mandatory but not a prohibitory injunction." (*Kettenhofen v. Superior Court* (1961) 55 Cal. 2d 189, 191; see Code Civ. Proc. § 916, subd. (a).) "The purpose of the automatic stay provision of Section 916, subdivision (a) is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided." (*URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 881, internal quotation marks omitted.)

"This rule is clear, but whether a decree is one or the other may be difficult to determine in some situations since an order entirely negative or prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect." (*Kettenhofen*, *supra*, 55 Cal.2d at p. 191.) Courts must determine the substance of an injunctive order, regardless of its form. (*URS Corp.*, *supra*, 15 Cal.App.5th at p. 884; see also *Union Pacific R.R. Co.*, *supra*, 49 Cal.3d at p. 158.) Critically, the substance of an order is defined by its effect on the status quo. "An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were prior to the entry of the judgment. On the other hand, it is mandatory in effect if its enforcement would be to *change the position of the parties and compel them to act in accordance with the judgment* rendered." (*Musicians Club of L.A. v. Superior Court* (1958) 165 Cal.App.2d 67, 71, italics added.)

---

[3] Some portions of the Judgment are unquestionably mandatory in form and effect and therefore automatically stayed on appeal—specifically, the portions ordering the City to hold a district-based election on July 2, 2019, with the districts defined by a map plaintiffs introduced at trial. (Judgment, ¶¶ 7–8.)

2. Paragraph 9 of the Judgment is Mandatory in Effect.

Paragraph 9 states: "Any person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this Judgment, is prohibited from serving on the Santa Monica City Council after August 15, 2019." This paragraph is a mandatory injunction because it changes the status quo by compelling the Council members to surrender a position that they now hold and to which they have been duly elected. (*Clute v. Superior Court* (1908) 155 Cal. 15, 18, 20 [injunction is mandatory, "though couched in terms of prohibition," because it "compels [defendant] affirmatively to surrender a position which he holds"].) Paragraph 9 is also mandatory because it effectively compels the City to act in accordance with the Judgment—that is, to conduct a district-based election in advance of August 15, 2019.

As an initial matter, if the phrase "in conformity with this Judgment" means that no council member may serve beyond August 15 unless he or she was elected in a district-based election taking place on July 2, 2019, as required in paragraph 8 of the judgment, that would make paragraph 9 *expressly* mandatory, since it would affirmatively require the City to hold an election on July 2. But the City understands that "in conformity with this Judgment" in paragraph 9 means that no council member may serve after August 15 unless he or she was elected in a district-based election consistent with the Court-ordered district maps—without any express requirement to hold such an election on any specific date. In any event, the difference is of little practical significance.

In order to comply with paragraph 9, the City must strip the current Council members of their positions and instruct them not to show up for Council meetings or otherwise serve after August 15. But the City must be governed by *somebody*, and its Charter specifically demands that it be a Council of seven members elected to four-year terms. (§§ 400 [defining powers of City], 605 ["All powers of the City shall be vested in the City Council"], 600 [City Council shall consist of seven members elected to-four-year terms].) If the current Councilmembers cannot continue to serve, then a new Council must be elected, or the City would be left without any governance. Under the judgment, such an election must be district-based. And under California law, it must, among many other things, be noticed at least 113 days before the election date. (Elec. Code, § 12101.) Accordingly, the Court's order prohibiting the current Council members from serving after August 15, 2019, requires

the City to give notice of an election in a matter of weeks and then to hold a district-based election in July—which is the very part of the judgment that is unquestionably stayed. Paragraph 9 would thus compel the Council members to surrender their current positions, and would command the City to take affirmative action to upset the status quo.

In this respect, paragraph 9 is similar to injunctions entered in other cases that were prohibitory in form but mandatory in effect:

- *Clute v. Superior Court* (1908) 155 Cal. 15: The treasurer and manager of a corporation operating a hotel was ousted from his positions. In subsequent litigation over the legitimacy of that ouster, the trial court prohibited the erstwhile corporate officer from holding himself out as such or otherwise doing his job. He appealed and continued to do his job; the trial court held him in contempt. The Supreme Court reversed, holding that the injunction was mandatory, "though couched in terms of prohibition," because it impliedly required the former corporate officer to turn over the hotel and the personal property in it to someone else—it "compels him affirmatively to surrender a position which he holds." (*Id.* at p. 20.) Accordingly, the injunction was automatically stayed by the taking of an appeal, and "no contempt proceedings against him should have been entertained." (*Ibid.*) *Clute* controls here. An order prohibiting a corporate officer from fulfilling his job duties is little different from this Court's order prohibiting councilmembers from serving after August 15.
- *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827: Paramount sued Bette Davis when she refused to film an additional scene for a movie. At the time, Davis was filming another movie under an exclusive contract with a different studio. The trial court prohibited Davis from filming any other movies until she filmed the additional scene for Paramount. Davis appealed and sought a writ of supersedeas. The Court of Appeal granted the writ, holding that "the injunctive order, although framed in prohibitory language, was intended to coerce or induce defendant into immediate affirmative action, i.e., to make the additional scene for Paramount" and thereby to "breach her contract" with the other studio. (*Id.* at p. 838.) Similarly, this Court's order that no councilmember

may serve after August 15, 2019, except those elected under a district-based election system, is functionally identical to the trial court's order in *Davis*. The effect of both is to compel the defendant to undertake a particular course of action—specifically, "to surrender a status and rights lawfully held . . . at the time the injunction issued," and to perform the act sought by the plaintiff that is the object of the suit—and thereby upset the status quo. (*Ibid.*)

- *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680: In this dispute over a fishing vessel, the trial court prohibited the defendant "from delivering to Sun Harbor Packing Company, or to anyone other than Westgate Sea Products Co., any fish caught on any fishing voyage made by the vessel Dependable," notwithstanding a contract to deliver to Sun Harbor. (*Id.* at p. 681.) The Court of Appeal held that this injunction was "but another means of stating that defendant must cease delivering to Sun Harbor Packing Company and must deliver fish to Westgate Sea Products Co.," and therefore was mandatory and automatically stayed pending appeal. (*Id.* at p. 686.) Paragraph 9 is substantially similar to the challenged injunction in *Ambrose*: it is "but another means of stating" that the City must hold district-based elections in the short term. Just as the defendant-appellant in *Ambrose* could continue honoring the challenged contract and delivering fish to Sun Harbor during the appeal, so, too, should the current Council be able to remain seated throughout the pendency of the City's appeal. To demand otherwise would be to compel an affirmative act and a departure from the status quo. (*Ibid.*)
- *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872: In a dispute between a contractor and subcontractor, the trial court granted the contractor's motion to disqualify the subcontractor's attorneys. The subcontractor appealed and sought a stay in the trial court pending appeal, which the trial court denied. The subcontractor then filed a petition for a writ of supersedeas, which the Court of Appeal granted. "An order disqualifying an attorney from continuing to represent a party in ongoing litigation is a mandatory injunction because it requires affirmative acts that upset the status quo. . . ." (*Id.* at p. 886.) Absent a stay, there was also serious risk of "mooting the appeal," insofar

as the subcontractor would "need to move on . . . and hire replacement counsel" and might choose not to pursue an independent appeal "because it will not make sense to reinsert [disqualified counsel] into the proceedings even if the order is reversed." (*Ibid.*) Likewise, here, paragraph 9 would require the City to proceed with a district-based election whose animating premise and particulars (especially the district lines drawn by plaintiffs and adopted by the Court without public input) will be the very subject of the City's appeal.

These are but a few of the many cases in which California's appellate courts have reaffirmed the principle that substantively mandatory injunctions, even if prohibitory in form, are automatically stayed by operation of law for the duration of an appeal. (E.g., *Food & Grocery Bur. of S. Cal. v. Garfield* (1941) 18 Cal.2d 174, 177–178; *Byington v. Superior Court of Stanislaus Cty.* (1939) 14 Cal.2d 68, 72; *Feinberg v. Doe* (1939) 14 Cal.2d 24, 27.) The Court should follow these controlling authorities and clarify that paragraph 9 is substantively mandatory, thereby relieving the parties and the Court of Appeal of the burdens of litigating and deciding a petition for a writ of supersedeas.

3. Plaintiffs' Arguments Against the Automatic Stay are Not Well Taken.

Plaintiffs may argue that some exception to the automatic-stay rule (see Code Civ. Proc., §§ 917.1–917.9) applies in this case. They would be wrong.

Plaintiffs previously invoked section 917.8, which applies when "a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state."[4] But the few cases that have cited this provision or its predecessor (former section 949) make clear that it applies only to actions brought in *quo warranto* under section 803 of the Civil Procedure Code—which is, not coincidentally, phrased in nearly identical language.[5]

---

[4] Section 917.8 provides, in relevant part: "The perfecting of an appeal does not stay proceedings, in the absence of an order of the trial court providing otherwise or of a writ of supersedeas, under any of the following circumstances: (a) If a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state."

[5] Section 803 provides, in relevant part: "An action may be brought by the attorney-general . . . against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, . . . within this state."

The California Supreme Court has held that where, as here, an action was not brought in *quo warranto* and was instead a challenge to an election, section 949 (now section 917.8) does not apply; as a result, "the perfecting of the appeal by the party aggrieved, *ipso facto*, operates as a *supersedeas*." (*Day v. Gunning* (1899) 125 Cal. 527, 528; see also *Anderson v. Browning* (1903) 140 Cal. 222, 223 [holding that "the certificate of election continues unimpaired during the pendency of the appeal"].) This narrow construction of section 917.8 has also been confirmed by legal treatises. (See, e.g., Cal. Jur. 3d, Appellate Review, § 412 ["Inasmuch as the language of [section 917.8] is similar to that contained in another statute authorizing an action in *quo warranto* for usurpation, it is apparent that the statutory exception under discussion refers *only* to actions of this character."], second italics added.) Section 917.8 thus has no application in this case.

Plaintiffs may also argue, as they have before, that "[w]here an injunction has both mandatory and prohibitory features, the prohibitory portions are not stayed *even if they have the effect of compelling compliance with the mandatory portions of the injunction.*" (Pls' Reply Br. re Appropriate Remedies, p. 4, italics in original.) But plaintiffs would be misstating the law, and none of the cases they have cited supported their argument.

- *Ohaver v. French* (1928) 206 Cal. 118: The case concerned an injunction prohibiting the transportation of garbage from Sacramento to a ranch in Yolo County, where it had been fed to hogs. The ranchers contended that the injunction would affirmatively require them to move their hogs elsewhere, but the Court specifically rejected that argument, noting that the ranchers could "feed their hogs other food and maintain them in such a manner as not to render them a nuisance to their neighbors." (*Id.* at p. 123.) It therefore was not an inevitable consequence of the injunction that the hogs had to be moved. Here, by contrast, enforcement of the injunction preventing councilmembers from serving after August 15, 2019, *would* carry the inevitable consequences of leaving the City without a Council and therefore mandating the election of a new one, by districts—precisely the portion of the judgment that is automatically stayed.
- *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80: The Supreme Court reviewed other cases wrestling with the mandatory-prohibitory distinction. In one,

for example, the defendants were enjoined from going on someone else's land to cut timber. That injunction was plainly prohibitory. (*Id.* at p. 85.) Although a forest unvisited by loggers will remain a forest, a Council without Councilmembers ceases to exist—and must be reconstituted through an election (which, under the Court's judgment, must be district-based).

- *Jaynes v. Weickman* (1921) 51 Cal.App. 696: An injunction prohibiting someone from engaging in trademark infringement is necessarily prohibitory in form. In *Jaynes*, the defendant could carry on with his business—just not under a name confusingly similar to that of the plaintiff. Here, by contrast, paragraph 9 prohibits the Council from going about its business entirely; it requires the Council to be disbanded and reconstituted.

In sum, the Court should confirm that paragraph 9 is "mandatory," not "prohibitory," in substance, such that it was automatically stayed upon the City's appeal.

B. To the Extent Paragraph 9 is Deemed to be Prohibitory in Nature, the Court Should Exercise its Discretion to Stay its Enforcement Pending the City's Appeal.

Even if the Court determines that paragraph 9 is "prohibitory," not "mandatory," in character, such that it is not automatically stayed, the Court should still exercise its discretion to stay it pursuant to section 918 of the Civil Procedure Code. (See *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 482 [noting trial court's power under section 918 to "stay enforcement of any judgment or order . . . whether or not a notice of appeal has been filed" and concluding that, "[i]nsofar as the judgment contemplated enforcement, the trial court had the express power to stay it."].)[6]

---

[6] The City seeks relief from this Court in the first instance, before seeking a writ of supersedeas from the Court of Appeal. The City notes, however, that it is unclear whether this Court has the authority to stay paragraph 9 on a discretionary basis, should the Court deem it prohibitory. "Under [Code of Civil Procedure] section 916, 'the trial court is divested of' subject matter jurisdiction over any matter embraced in or affected by the appeal during the pendency of that appeal" and "any judgment or order rendered by a court lacking subject matter jurisdiction is 'void on its face. . . .'" (*Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 197.) "The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided." (*Betz v. Pankow* (1996) 16 Cal.App.4th 931, 938; but see Code Civ. Proc., § 918 [authorizing trial court to stay enforcement of any order, even after filing of notice of appeal].)

As the Court is aware, the City's appeal will raise numerous significant issues, some of first impression in California's appellate courts. The City has at least a reasonable chance of prevailing on one or more of those issues, for all of the reasons explained in detail in the City's objections to the plaintiffs' Proposed Statement of Decision, which the Court ultimately adopted as its own with minor changes. If the Court of Appeal ultimately reverses the judgment, then the enforcement of paragraph 9 during the pendency of the City's appeal will have worked irreparable harm on the City, its current Council members, and the public at large.

First, most directly, the enforcement of paragraph 9 would threaten to leave the City without *any* governing body for some period of time.

Second, as noted above, were paragraph 9 enforced during the appeal, the City would have no choice but to immediately scrap its longstanding at-large City Council election system in favor of a district-based election scheme using the district maps drawn by plaintiffs' expert without any public input. The City will argue on appeal that this Court erred by invalidating the City's at-large election system and by not following the public-input process of Elections Code section 10010 when determining the boundaries for the districts. But without a stay of paragraph 9, the City would be compelled to hold a district-based election, using the very districts that it contends are unlawful. And if the Court of Appeal ultimately agrees with the City as to applicability of Elections Code section 10010 here, the City and its voters will have gone through an unnecessary and unlawful election process this summer, and Santa Monica's residents will be governed for some period of time by a Council elected using those districts.

Third, most of the City's current Councilmembers were preferred by Latino voters in the most recent elections. In the 2016 election, Tony Vazquez, one of two Latino-preferred candidates (Ex. 290), prevailed. He has since left the Council for a seat on the State Board of Equalization; the Council appointed Ana Jara, a Latina who resides in the Pico Neighborhood, to fill his seat for the balance of his term (until November 2020). (Scolnick Decl., ¶ 6, Ex. B.) In the 2018 election, Latino voters' top three choices (by point estimates) *all* won seats on the Council: Sue Himmelrich, Greg Morena, and Kevin McKeown. (See Lewis Decl., ¶ 5.) Without a stay of paragraph 9 during the appeal, these Latino-preferred and/or Latina Council members must vacate their seats.

One of the City's arguments on appeal is likely to be that the districts the Court has imposed will dilute Latinos' voting power citywide. In six of the seven districts—where two-thirds of the City's Latino population resides—there is no dispute that Latinos will have *less* voting power than they currently have in an at-large system. (E.g., Tr. 1936:25–1937:11, 2942:23–2943:7, 3091:17–3093:12.) This is because the Court-imposed districts submerge the City's Latinos into districts where they represent only a small fraction of that district's voting population. The Court should therefore stay the enforcement of paragraph 9 to allow the Court of Appeal to examine these important issues before imposing such a dramatic change and risking the dilution of Latino votes—precisely the result that the CVRA and the Equal Protection Clause were intended to avoid.

Fourth, in the November 2018 election, seven candidates ran for City Council—each of them engaged in fundraising and campaigning throughout the City last fall, with the help of volunteers and staff. And importantly, Santa Monica's voters expended the time and effort during this period to get to know these candidates and educate themselves on the issues. Absent a stay of paragraph 9 during the appeal, this Court will have nullified the fundamental constitutional rights of Santa Monica's voters to have their voices heard in the electoral process. (See Cal. Const., art. II, § 2.5 ["A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted"]; *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 370 [right to vote is a "fundamental political right"].) Public policy militates strongly against such a result, given the possibility that the Court of Appeal may view the novel points of law raised in this case differently from this Court. (See, e.g., *United States v. City of Houston* (S.D. Tex. 1992) 800 F.Supp. 504, 506 ["When elections have been held even under a voting scheme that does not technically comply with section 5 [of the Voting Rights Act] the people have chosen their representatives. Neither the Justice Department nor this court should lightly overturn the people's choices."].)

Fifth, were the City required to hold a special district-based election in July 2019, the County of Los Angeles has estimated that it would charge the City approximately $875,000 for its assistance in providing computer records of voters' names and addresses, furnishing printed indices of voters to be used at polling places, and furnishing election equipment. (Anderson-Warren Decl., ¶ 4.) And in order to hold such an election, there are many steps that the City would need to take—also involving

the City, County officials, and the Secretary of State—in the coming weeks and months in order to comply with the relevant provisions of the Elections Code and Government Code. (*Id.*, ¶ 5.) Again, if the City ultimately prevails in its appeal, all of this work and expense would have been unnecessary.

Sixth, as the City pointed out in its January 2, 2019, brief in response to plaintiffs' *ex parte* application, forcing the City to hold an election before the next regularly scheduled general election in November 2020 could have serious unintended consequences—particularly if that election must be held before August 15, 2019, and thus in the summer months when many people are on vacation. Since 1984, the City has held its elections "on cycle" in November in even-numbered years, to coincide with presidential and gubernatorial elections—previously, the City's elections had been held "off cycle," in April in odd-numbered years. (Trial Tr. 3817:6–3818:10; see Ex. 1378-2.) This change to on-cycle elections was "[e]xtremely beneficial to minorities" because "[i]t is well established in the literature that elections that occur in odd numbered years significantly dampen voter turnout. . . . [T]he biggest beneficiaries in this jump in turnout are traditionally low turnout groups, notably Latinos and Asians. . . . So [holding on-cycle elections in November in even-numbered years] generally makes municipal elections more participatory and specifically helps minorities, particularly Asians and Latinos." (Trial Tr. 3818:11-3819:3.)[7]

Seventh, if the City must hold an election before August 15, 2019, and if the Court of Appeal later reverses this Court's judgment, there would need to be yet *another* Council election for all seven Council members—which would be the third City Council election in a two-year span. In addition to the expenditure of time and resources by the City and the candidates, such a frequency of elections, under two entirely different schemes, would risk voter confusion and fatigue, and perhaps undermine voters' confidence in the electoral system.

---

[7] Largely for these same reasons, the California Legislature enacted the Voter Participation Rights Act, effective January 1, 2016, which prohibits off-cycle elections in jurisdictions that experience a significant decrease in voter turnout. Elections Code section 14052 provides that "a political subdivision shall not hold an election *other than on a statewide election date* if holding an election on a nonconcurrent date has previously resulted in a significant decrease in voter turnout." (Italics added.) And effective January 1, 2019, a "statewide election date" must be either in November or March of an even-numbered year. (Elec. Code, § 1001.)

Finally, the City reiterates that its voters have twice rejected a shift to district elections at the polls, concluding that an at-large election method better suits their unique City because council members in a district-system are not accountable to every neighborhood, because voters in a district-based system get to voice their preferences only once every four years, and because districts may incentivize councilmembers to put parochial interests ahead of the good of the City as a whole. Absent a stay of paragraph 9, the Court would be foisting those significant changes upon the voters, against their will, before the Court of Appeal has had the opportunity to review whether such a change is legally required.

IV. CONCLUSION

For these reasons, the Court should confirm that paragraph 9 of the judgment is a mandatory injunction and thus stayed automatically by the City's appeal. In the alternative, to the extent paragraph 9 is deemed to be prohibitory in nature, the Court should exercise its discretion to stay it pending the outcome of the City's appeal.

DATED: February 28, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____

Theodore J. Boutrous, Jr.
Attorney for Defendant
City of Santa Monica