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Attorneys for Defendant
CITY OF SANTA MONICA

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; and DOES 1–100, inclusive,

Defendants.

CASE NO. BC 616804 (filed Apr. 12, 2016)

DECLARATION OF GEORGE H. BROWN IN SUPPORT OF CITY OF SANTA MONICA'S DEMURRER

[Notice of Demurrer and Demurrer, Request for Judicial Notice and Declaration of Daniel R. Adler, and [Proposed] Order filed concurrently]

Assigned to Hon. Yvette M. Palazuelos

Cal. Gov. Code § 6103

HEARING:
Date/Time: May 22, 2017, at 8:45 a.m.
Dept.: 28
Res ID: 170203193236
Trial Date: October 30, 2017

DECLARATION OF GEORGE H. BROWN

I, George H. Brown, declare as follows:

1. I am an attorney duly admitted to practice law before all Courts of the State of California. I am a partner at Gibson, Dunn & Crutcher LLP, and counsel for the City of Santa Monica. Unless otherwise stated, I have personal knowledge of the matters stated in this declaration, about which I could and would testify competently if called as a witness. I make this declaration in support of the City of Santa Monica's demurrer to plaintiffs' first amended complaint.

2. After receiving and reviewing the first amended complaint, I determined that it did not state facts sufficient to state a cause of action under either the California Voting Rights Act or the Equal Protection clause of the California Constitution.

3. My colleagues and I contacted opposing counsel by means of a letter, transmitted electronically, noting the nature of our objections to the first amended complaint and inviting opposing counsel to meet and confer concerning those objections at a mutually convenient time, in accordance with my obligations under Code of Civil Procedure section 430.41, subdivision (a). That letter is reproduced as Exhibit A below.

4. On March 22, 2017, my colleagues and I met telephonically with opposing counsel to discuss the first amended complaint and the demurrer that we were contemplating filing. We discussed my concerns that plaintiffs' two causes of action were not adequately pleaded, but we were unable to resolve my objections without the assistance of the court.

5. That same day, my colleagues and I sent another letter, again electronically, to opposing counsel, to record our understanding of the parties' positions on the issues. That letter is reproduced as Exhibit B below.

6. The next day, March 23, 2017, opposing counsel sent their own confirmatory letter, which is reproduced as Exhibit C below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 30th day of March, 2017, in Los Angeles, California.

George Brown

George H. Brown

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Cynthia Britt, declare:

I am employed in the County of Los Angeles, State of California. My business address is 333 South Grand Ave, Los Angeles, California 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On March 30, 2017, I served the **DECLARATION OF GEORGE H. BROWN IN SUPPORT OF CITY OF SANTA MONICA'S DEMURRER** on the interested parties in this action by causing the service delivery of the above document as follows:

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John L. Jones, Esq.
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☑ BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing cor-respondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 30, 2017, in Los Angeles, California.

Cynthia Britt

EXHIBIT A

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March 16, 2017

VIA ELECTRONIC MAIL

Kevin Shenkman
Shenkman & Hughes
28905 Wight Road
Malibu, CA 90265

Pico Neighborhood Association v. City of Santa Monica

Dear Kevin:

We write to initiate the meet-and-confer process in advance of the City of Santa Monica's deadline to demur to the first amended complaint, as set forth in section 430.41, subdivision (a) of the Code of Civil Procedure. Under that section, the meet-and-confer must be held by March 25, 2017, and hopefully we can arrange a telephone call with you and/or your colleagues (whom I have cc'd here) well before then. Below I have indicated some proposed dates and times. Please let me know at your earliest convenience which of these work for you and/or your colleagues, or some other proposed time.

In addition, in order to make the City's legal position clear and to make our call as productive as possible, I have set out the grounds on which the City intends to premise its demurrer and a concise summary of the City's arguments in support of its demurrer.

Proposed times

- Monday, March 20, between 10 a.m. and 2:30 p.m.;
- Tuesday, March 21, between 10:30 a.m. and 1:00 p.m., or 2:00 p.m. and 4:30 p.m.; or
- Wednesday, March 22, between 9:30 a.m. and 11:30 a.m., or 3:30 and 5:00 p.m.

Ground for demurrer

Barring plaintiffs' agreement to further amend, the City intends to demur to the first and second causes of action set out in the first amended complaint (FAC) on the ground that it fails to state facts sufficient to constitute a cause of action under both the California Voting Rights Act (CVRA) and the Equal Protection clause of the California Constitution. (Code Civ. Proc., § 430.10, subd. (e).)

Arguments

What follows is an overview of the City's arguments in support of its demurrer. The precise nature of those may change between now and the filing on March 30, 2017, but their general contours and their basis (namely, Code Civ. Proc., § 430.10, subd. (e)) will remain the same.

The FAC's CVRA cause of action has at least two deficiencies.

First, like its predecessor, the FAC fails to plead its CVRA claim with the requisite factual basis required under California pleading standards. The FAC includes a handful of new allegations regarding particular elections, but does not allege any facts showing that voting was racially polarized in those or any other elections. It instead asserts mere legal conclusions that, for instance, particular candidates were "Latino-preferred" or that Latinos voted "cohesively." Such legal conclusions are entitled to no weight. (See *Baughman v. California* (1995) 38 Cal.App.4th 182, 187.) Further, pleading racially polarized voting requires more than alleging facts about four elections over a 23-year period. A CVRA plaintiff has an obligation to plead facts showing that a cohesive white voting bloc "usually" outvotes a cohesive Latino voting bloc. (*Thornburg v. Gingles* (1986) 478 U.S. 30.)

Second, the FAC, like the initial complaint before it, fails to allege injury or causation. Section 14027 of the Elections Code requires a CVRA plaintiff to demonstrate that an electoral system has "impair[ed] the ability of a protected class to elect candidates of its choice . . . as a result of the dilution . . . of the rights of voters who are members of a protected class." As the City argued in its motion for judgment on the pleadings, it will again argue that the statute requires a CVRA plaintiff to allege facts showing that an alternative system would have produced a different result. The FAC alleges no such facts. At most, it suggests that one candidate, Oscar de la Torre, received many votes in four precincts. But four precincts do not make a district. And it is equally unclear from the complaint that any alternative electoral system other than a district-based system would have produced a different result.

The FAC's Equal Protection claim also has at least two deficiencies. To prove that a facially race-neutral law that has been applied evenhandedly violates the Equal Protection clause, a plaintiff must demonstrate that the law was motivated by discriminatory intent and has had a disparate impact. (See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* (1985) 429 U.S. 252.) The FAC does not allege facts showing either discriminatory intent or disparate impact.

The FAC's only allegation of disparate impact is that there supposedly has been but a single Latino councilmember since 1946. But in granting the City's motion for judgment on the

pleadings, the court rejected this allegation as a basis for CVRA liability for a reason that also applies to the Equal Protection cause of action—the ethnicity of a candidate says nothing about whether that candidate is preferred by other members of the same ethnicity. Furthermore, the FAC, like the initial complaint, does not account for the fact that Santa Monica first adopted an at-large election system in 1914, not in 1946. The transition from a three-commissioner system, which was in place from 1914 to 1946, to the present-day seven-councilmember system necessarily expanded the voting power of minority groups that vote cohesively. The larger the number of representatives, the smaller a cohesive group can be and still elect its candidate of choice. Accordingly, the 1946 City Charter amendment could not have had a disparate impact on any ethnic minority voters.

The FAC also fails to allege discriminatory intent. To state a violation of the Equal Protection clause, a plaintiff must allege facts showing that the relevant decisionmakers were not only were aware that their decision might have a disparate impact on racial minorities, but that they *intended* that disparate impact. (*Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279.) The only fact alleged in the initial complaint was an advertisement suggesting that the Charter amendment might have a negative effect on minority voters. In granting the City's motion for judgment on the pleadings, the court deemed that allegation insufficient to show discriminatory intent. Although the FAC contains some new allegations, they all suffer from the same flaw as the allegation in the initial complaint: There is no direct connection between the City and those with decisionmaking authority and any purportedly discriminatory statements. Finally, the FAC also fails to take into account the fact that Santa Monica voters in 1975 and 2002 had an opportunity to reject the City's longstanding electoral system and to replace it with plaintiffs' preferred districted-based electoral system. The voters twice declined to do so, and the FAC contains no allegations whatsoever about those decisions, much less any allegations showing that they were motivated by a discriminatory purpose.

The City intends to request that the court sustain its demurrer without leave to amend.

We look forward to speaking with you next week at a mutually convenient time.

Sincerely,

William E. Thomson

WET/lsj

cc:

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Jonathan Douglass
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Milton Grimes
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EXHIBIT B

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March 22, 2017

VIA ELECTRONIC MAIL

Kevin Shenkman
Shenkman & Hughes
28905 Wight Road
Malibu, CA 90265

Re: *March 22, 2017, meet-and-confer*

Dear Kevin:

Thank you for taking the time to meet and confer with me and my colleagues earlier today. Unfortunately, we were not able to convince you to seek leave to amend your complaint for a second time, and you were not able to convince us that the complaint alleges facts sufficient to state a cause of action under either the CVRA or the Equal Protection clause.

CVRA

Following up on my detailed letter dated March 16, 2017, we discussed two broad issues relating to the CVRA claim: (i) whether the complaint has alleged facts concerning enough candidates and elections to demonstrate that a white voting bloc "usually" outvotes a Latino voting bloc under *Gingles*; and (ii) whether the complaint has alleged facts to show that particular candidates were Latino-preferred.

Candidates and elections. The complaint addresses only four candidates for the Council. One of those candidates ran in 1994, almost a decade before the CVRA was enacted. Because California statutes do not apply retroactively unless the California Legislature expressly says as much, the CVRA does not apply to elections predating its 2002 enactment, including the 1994 election addressed by your complaint. And the three remaining unsuccessful candidacies do not demonstrate a pattern of voting behavior from which anyone could reasonably conclude that a white voting bloc "usually" outvotes a Latino voting bloc. We encouraged plaintiffs to include as many good-faith allegations as possible, but you did not indicate any interest in amending at this juncture, explaining that you were confident the Court would give you another opportunity to amend even if it sustained the City's demurrer.

Latino-preferred candidates. The complaint does not allege any *facts* to show that the four losing candidates it mentions were Latino-preferred. The complaint instead simply labels them as such, and mere labels or legal conclusions are not the same as facts. You asked whether the supporting facts must take the form of an ecological regression demonstrating the Latino support for each candidate in each relevant election. I took no position on whether such a regression in the abstract—or any other hypothetical factual allegations—would satisfy your obligation to plead facts supporting the "Latino-preferred" label, because the legal sufficiency of such allegations would depend on their specifics.

You also suggested that the City's position on this issue was a ploy to cover the City's desire to see any expert reports that you have prepared. My colleagues and I explained that it was no such thing, and that we simply believe that the complaint does not set out an adequate factual basis for a CVRA claim. We further suggested if you have done significant preliminary work, it would be wise to incorporate such work in an amended complaint—both so as to give the City notice of the basis of plaintiffs' claims and so as not to waste the Court's time with needless motion practice. We also explained that we would be open to negotiating a sensible schedule for the exchange of expert reports and other information if that was the issue, but you did not indicate any interest in doing so.

Equal Protection

We understand your position to be that the Equal Protection clause does not require a showing of disparate impact and discriminatory intent—that discriminatory intent alone is enough—but that even if it does, your complaint adequately alleges both.

The City's position is that both are required, and that the complaint adequately alleges neither. First, the complaint focuses on only one of several relevant electoral decisions. The City first turned to at-large elections in 1914, about which decision the complaint is silent. Further, the voters twice decided, in 1975 and in 2002, to retain that system, rejecting two attempts to install a districted election system. The complaint is also silent as to these decisions, alleging no facts even suggesting a discriminatory motive. Second, the complaint does not demonstrate that the City's electoral system has had a disparate impact on ethnic minorities. The only factual allegations that could support such a contention are a) your allegation that only one Councilmember since 1946 has been Latino, which the trial court has already rejected as inadequate to support an Equal Protection claim; and b) your allegation that four candidates over a 23-year period did not win election, which, if anything, is even more inadequate to demonstrate a disparate impact over a 71-year period than it is to show a pattern of white bloc voting defeating Latino bloc voting in relatively recent history. Third and finally, the complaint alleges no facts showing that any decisionmakers adopted an at-large electoral system *because of*, and not in spite of, the potential for any disparate impact on ethnic minorities.

Absent an indication that plaintiffs are willing to amend their complaint, the City intends to file its demurrer on March 30, 2017. If plaintiffs change their mind about amending the complaint, please let us know by Monday, March 27 at the latest.

Sincerely,

William E. Thomson

WET/dra

cc:

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EXHIBIT C

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VIA E-MAIL

March 23, 2017

William Thomson
Gibson Dunn & Crutcher LLP
wthomson@gibsondunn.com

Re: Pico Neighborhood Association, et al. v. City of Santa Monica

Mr. Thomson:

I am writing to follow up on our conversation yesterday, and to dispel some of the mischaracterizations in your subsequent letter that night.

It was clear from very early in our conversation that you had no desire to resolve any issues relating to your anticipated demurrer; in fact, at one point during our conversation you stated that you wanted to just file a demurrer rather than engage in the required meet-and-confer process. That is, of course, consistent with your remark at the hearing on Defendant's motion for judgment on the pleadings that you did not meet-and-confer prior to that motion because you didn't have to.

Defendant's contentions regarding the level of detail required to plead a CVRA claim are particularly troubling because your argument is that the FAC is not sufficiently detailed, yet the FAC in this case is significantly more detailed than the CVRA complaints signed by Defendant's counsel in other cases. When I raised this issue in our call, you had no substantive response other than to say that those complaints were not challenged.

First, we discussed the cause of action for violation of the California Voting Rights Act ("CVRA"). You communicated your position that the number of exemplary elections discussed in our First Amended Complaint ("FAC") – four – is insufficient. I asked you if four is insufficient, how many would be sufficient? You refused to answer that question, repeating only that we should include as many as we can. I asked you if you had any authority supporting your position that allegations specific to a particular number of elections was required, and you failed to identify any such authority.

Next, still in connection with our CVRA claim, you communicated your position that our identification of Tony Vazquez, Josefina Aranda, Maria Loya and Oscar de la Torre as the Latino-preferred candidates in the elections of 1994, 2002, 2004 and 2016 is insufficient. I asked you what would be sufficient detail to allege those candidates were

preferred by Latino voters, and whether you had any authority supporting your position that something more than the identification of a candidate as being Latino-preferred is required at the pleading stage. You failed to provide any such authority, and refused to answer what would be sufficient. In the subsequent discussion, you seemed to suggest that an ecological regression estimate of the Latino support for each candidate was required, but acknowledged that you had no authority for that proposition.
You also claimed that we needed to allege that in a district-based election system the results would have been different. But that is impossible to know in ***any*** case ***anywhere***. If the election system were different, there would likely have been different candidates, campaigning in different ways. Nobody could tell what the results would have been with any degree of certainty. In any event, the CVRA certainly does not require any such showing.

We then turned to the Equal Protection cause of action. You communicated your position that we need to allege discrimination with respect to four separate elections – 1914, 1946, 1975 and 2002 – even though the current election system was enacted only in 1946. Though we did not discuss this in depth, please provide any authority you may have for the position that an Equal Protection claim must allege discrimination at times other than when the relevant election system was adopted – e.g. when a different system of government was previously enacted or when a different election system was rejected. So far, we certainly haven't seen anything that would support your position.

Then, you communicated your position that the FAC fails to allege sufficient facts to support the allegation that the 1946 adoption of the current election system was intended to discriminate against racial minorities. You argued that the FAC focuses on the statements of *opponents* of the 1946 charter amendment (which you argued are irrelevant, and we disagree), but then conceded that the FAC also points to statements of *proponents* of the 1946 charter amendment. Of course, the FAC includes facts concerning more than just contemporary statements, though we did not discuss those.

You also communicated your position that we failed to allege sufficient facts to show a disparate impact. Putting aside the legal issue – that discriminatory impact is not necessary, only discriminatory intent – I stated that the FAC does allege a discriminatory impact, through the lack of success of Latino candidates and Latino-preferred candidates.

Finally, I asked you what further detail would be sufficient for our Equal Protection claim. You refused to answer that question, and instead stated that except in extraordinary circumstances it is impossible to allege an Equal Protection claim based on an enactment from many years ago.

Since your contentions all relate to the level of detail in the FAC, even if the Court were to accept your arguments (which seems unlikely) Plaintiffs would still be entitled to leave to amend their complaint. In light of that fact, the meet-and-confer process would have been far more productive if you did not refuse to answer what further detail would make

the FAC sufficient. I encourage you to answer that question, and perhaps avoid wasting the Court's time on another pleading motion in a case where Defendant undoubtedly understands Plaintiffs' claims.

Very truly yours,

/s/ Kevin Shenkman

Kevin Shenkman