

No. B295935

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**
SECOND APPELLATE DISTRICT

CITY OF SANTA MONICA,
Petitioner-Defendant,

v.

PICO NEIGHBORHOOD ASSOCIATION; MARIA LOYA
Respondents and Plaintiffs.

Appeal From Superior Court for the County of Los Angeles
The Hon. Yvette M. Palazuelos, Judge Presiding
Superior Court Case No. BC616804
Department 9 Telephone: (213) 310-7009

**MOTION TO STRIKE & SUPPORTING
MEMORANDUM**

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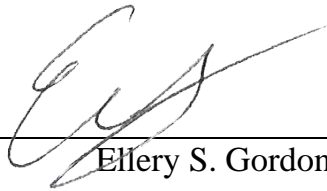
**MOTION TO STRIKE THE DECLARATION OF JEFFREY LEWIS
ATTACHED AS EXHIBIT GG TO PETITIONER’S VOLUME 5 OF
5, PAGES 1140 - 1143**

Plaintiffs and Respondents Pico Neighborhood Association and Maria Loya (“Respondents”) hereby move to strike pages 1140–1143 within Volume 5 of 5 of the Petitioner-Defendant City of Santa Monica’s (“Petitioner”) exhibits—the declaration of Jeffrey Lewis (Exhibit GG) – as well as all references thereto in Petitioner’s petition for a writ of supersedeas.

This motion is based upon the attached memorandum of points and authorities, the [Proposed] Order attached hereto, and the documents and pleadings on file with the Court of Appeal.

March 21, 2019

By: _____



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Pico Neighborhood Association, et al.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND SUMMARY OF MOTION

Respondents move this Court to strike pages 1140–1143 within Volume 5 of 5 of the Petitioner-Defendant City of Santa Monica’s exhibits—the declaration of Jeffrey Lewis (Exhibit GG).

In support of its *ex parte* application to stay paragraph 9 of the Judgment in the Trial Court, Petitioner offered the declaration of Jeffrey Lewis, one of its expert witnesses at trial. The declaration included statistical analysis of Petitioner’s November 2018 election, which occurred nearly two months after the conclusion of the trial. Of course, Respondents never had an opportunity to depose or cross-examine Dr. Lewis concerning that new statistical analysis.

At the hearing on Petitioner’s *ex parte* application on March 4, 2019, Respondents moved to strike the declaration of Dr. Lewis, and two days later the Trial Court granted that motion to strike. Petitioner does not contest the propriety of the Trial Court’s order striking the declaration of Dr. Lewis. Still, in its petition for a writ of supersedeas, Petitioner cites repeatedly to the declaration of Jeffrey Lewis.

Petitioner, like any other party in an appellate court, may not cite to matters outside of the record. Therefore, this Court should strike the declaration of Jeffrey Lewis and should not consider it.

ARGUMENT

I. WHEN A BRIEF CITES TO MATTERS OUTSIDE OF THE RECORD, THAT PORTION OF THE BRIEF AND ANY CORRESPONDING EXHIBITS SHOULD BE STRICKEN.

When a brief or part of a brief fails to comply with the Rules of Court (i.e. lacks citation to the record or refers to matters outside the record), the opposing party may file a motion to strike the brief in whole or in part; or the Court of Appeal may order the brief stricken (or corrected) on its own motion. (Cal. Rules of Court, rule 8.204, subd (e)(2); see *C.J.A. Corp. v. Trans-Action Fin'l Corp.* (2001) 86 Cal.App.4th 664, 673, [granting motion to strike “several passages” in brief that referred to evidence not in record].)

Here, Petitioner purports to introduce evidence that it concedes was stricken by the trial court—the declaration of Jeffrey Lewis submitted nearly six months after the conclusion of trial. (See Petitioner Brief, at pp. 20, 29; Petitioner’s Exhibit JJ [trial court order striking Lewis Declaration].) Indeed, Defendant asserts that the trial court “struck, without explanation, the declaration of Dr. Jeffrey Lewis, which the City had submitted with its application” (Petitioner’s Brief, at p. 20.)

However, there are numerous reasons why the trial court struck Jeffrey Lewis' declaration. Those points were addressed by Plaintiffs' counsel at the hearing of Defendant's ex parte application on March 4, 2019:

Your honor, we would move to strike Jeffrey Lewis's declaration. That has nothing to do with an ex parte motion before you, and it puts all kinds of evidence before the court in violation of our right to cross-examine and confront -- cross-examine him and confront that witness on this particular subject. And it further is -- is -- the effect of it is that they're now recalling a witness after the trial to put in additional testimony and I think it was for the purposes of getting it before the court of appeals and we move to strike it.

(See Petitioner's Exhibit II, at pp. 1190 of Volume 5 of 5.)

Furthermore, Defendant's purported newfound concern for "the loss of the representation of [the Latino population's] preferred candidates" is too little too late, and defies the authority concerning the federal Voting Rights Act. Specifically, Respondent's November 2018 election included no Latino candidates. The federal courts have recognized that a lack of minority candidates is often symptomatic of the vote dilution of at-large elections. (See, e.g., *Westwego Citizens for Better Government v. City of Westwego* (5th Cir. 1989) 872 F. 2d 1201, 1208-1209, n. 9.) Therefore, nothing about the November 2018 election undermines the Trial Court's finding that Petitioner's at-large election system violates the California

Voting Rights Act and the Equal Protection Clause of the California Constitution.

The Court has three alternatives to address the improper inclusion of evidence outside of the record: (1) it may order the brief to be returned to counsel for correction and refile within a specified time (Cal. Rules of Court, rule 8.204, subd. (e)(2)(A)); (2) it may strike the brief with leave to file a new brief within a specified time (Cal. Rules of Court, rule 8.204, subd. (e)(2)B)); or (3) it may disregard the noncompliance and consider the brief as if it were properly prepared. (Cal. Rules of Court, rule 8.204, subd. (e)(2)(A).)

In this circumstance, the Court should strike the declaration of Jeffrey Lewis altogether and should also strike any references thereto in Defendant's brief. (*C.J.A. Corp. v. Trans-Action Fin'l Corp.* (2001) 86 Cal.App.4th 664, 673, [granting motion to strike "several passages" in brief that referred to evidence not in record].) If the Court is not inclined to do so, the Court should require Petitioner to either refile its brief without the references to the declaration of Dr. Lewis or strike Petitioner's brief altogether and grant it leave to file a new brief. But, if the Court selects one of those options, Petitioner should not be heard to later complain about the timing of this Court's decision on its petition for a writ of supersedeas. If the Court is inclined to disregard Defendant's noncompliance with the rules

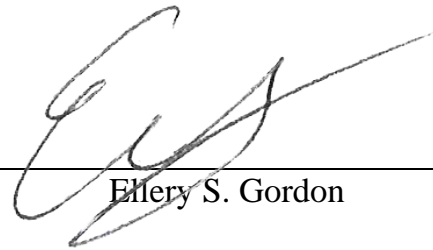
and law cited above, it should consider the brief as if it were properly prepared but choose not to consider the declaration of Jeffrey Lewis.

CONCLUSION

For the forgoing reasons, the court should strike the declaration of Jeffrey Lewis altogether. At a minimum, the Court should not consider the declaration of Jeffrey Lewis.

March 21, 2019

By: _____



Ellery S. Gordon

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ATTORNEYS FOR PLAINTIFFS
RESPONDENTS
Pico Neighborhood Association, et al.

ORDER

IT IS HEREBY ORDERED that Respondents’ motion to strike Jeffrey Lewis’ declaration and all references thereto in Respondents’ brief is GRANTED.

All portions of Petitioner’s opening brief filed on March 8, 2019, related to Jeffrey Lewis’ declaration (Exhibit GG, pages 1140–1143 within Volume 5 of 5 of the Petitioner-Defendant City of Santa Monica’s exhibits) is stricken. The Court will not consider the declaration of Jeffrey Lewis.

DATE: _____

Presiding Justice

PROOF OF SERVICE

I, Marci Cussimonio, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 43364 10th Street West, Lancaster, California 93534. On March 21, 2019, I served the following documents:

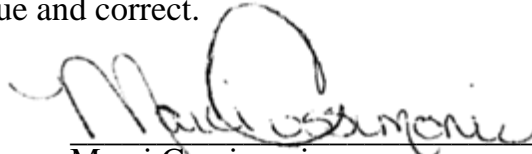
**MOTION TO STRIKE & SUPPORTING MEMORANDUM;
PROPOSED ORDER**

**** See Attached Service List ****

- [x] **BY MAIL as follows:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U. S. postal service on that same day with postage thereon fully prepaid at Lancaster, California in the ordinary course of business. I am aware that on motion of the 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.
- [x] **BY ELECTRONIC SERVICE: A true and correct copy of the above-titles documents were electronically served on the persons listed on the attached service list.**
- [x] I am employed by R. Rex Parris, a member of the bar of this court, and the foregoing documents were printed on recycled paper.

Executed on March 21, 2019, at Lancaster, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


Marci Cussimonio

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