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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA, Plaintiffs, v. CITY OF SANTA MONICA, and DOES 1 through 100, inclusive, Defendants.	CASE NO. BC616804 **PLAINTIFFS' REPLY BRIEF REGARDING APPROPRIATE REMEDIES** [Supplemental Declaration of Kevin Shenkman filed concurrently herewith] Hearing Date: December 7, 2018 Hearing Time: 9:30 a.m. Dept.: 28 [Assigned to the Honorable Yvette Palazuelos]

I. Introduction

Having been afforded at least two opportunities – at trial and again following this Court's tentative decision – Defendant refuses to propose any remedy at all. So, it is now time for this Court to do what the California Voting Rights Act ("CVRA") commands this Court to do – "implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." (Elec. Code § 14029).

Plaintiffs have proposed a district map that conforms to California law, and a commonsense timeframe to implement those districts and remedy past vote dilution in a speedy, yet orderly, manner. In contrast, the timing proposed by Defendant would leave the stain of its illegal and racially-discriminatory at-large election scheme for years before any remedy is selected, and even longer before any remedy is implemented. The Latino residents of Santa Monica have already waited long enough.

II. Defendant's Attempt to Re-Argue Liability

A significant portion of Defendant's brief that was supposed to address the "appropriate/preferred remedy" (November 8 Order) is instead devoted to arguing, again, that this Court should not impose any remedy at all. (Def. Brief, pp. 2-5, 9-11). Those arguments have all been addressed through nearly three years of litigation, at trial and in Plaintiffs' closing briefs, and this Court has already rejected those arguments as evidenced by the Court's November 8 Tentative Decision. There is no reason to revisit those arguments.

III. Defendant Has Once Again Failed to Propose a Remedy.

After more than two years of litigation, the trial of this case began on August 1, 2018 and ended six weeks later. Defendant chose not to request that the trial be bifurcated between liability and remedies, perhaps as part of its strategy to require Plaintiffs to show the availability of a remedy to improve Latino voting power. The trial was not bifurcated. Though Plaintiffs presented the seven-district map (Tr. Ex. 261) and other evidence regarding appropriate remedies, Defendant failed to propose any remedy at all. Then, on November 8, 2018 this Court gave Defendant another opportunity, ordering the parties to file briefs and attend a hearing "regarding the appropriate/preferred remedy for violation of the [CVRA]." Yet, again, Defendant has not proposed a remedy, other than to say that it prefers the implementation of district-based elections over the less-common at-large

remedies discussed at trial. (Def. Brief, p. 8).

Where, as here, a defendant fails to propose a remedy to a voting rights violation on the schedule directed by the court, the court must provide a remedy without the defendant's input. (See *Williams v. City of Texarkana* (8th Cir. 1994) 32 F.3d 1265, 1268 ["If [the] appropriate legislative body does not propose a remedy, the district court must fashion a remedial plan."]; *Bone Shirt v. Hazeltine* (D.S.D. 2005) 387 F.Supp.2d 1035, 1038 [same]). Having given Defendant every opportunity to propose a remedy, this Court now has a duty to adopt remedies without Defendant's input.

Defendant might ignore the 2+ years it had prior to the trial to develop a remedy proposal, and argue that this Court's November 8 Order did not give it sufficient time to propose a remedy. But, even counting from the time Defendant received this Court's November 8 Order (November 13) to the date it filed its "Answering Brief Regarding Remedies" (November 30) – the 17 days it had is perfectly in line with what other courts have afforded defendants to propose a remedy following a determination that voting rights have been violated. (See, e.g., *Williams v. City of Texarkana* (W.D. Ark. 1992) 861 F.Supp. 756, 767 [requiring the defendant to submit its proposed remedy 16 days after finding Texarkana's at-large elections violated the FVRA], aff'd (8th Cir. 1994) 32 F.3d 1265; *Larios v. Cox* (N.D. Ga. 2004) 300 F.Supp.2d 1320, 1356–1357 [requiring the Georgia legislature to propose a satisfactory apportionment plan <u>and</u> seek Section 5 preclearance from the U.S. Attorney General within 19 days]; *Jauregui v. City of Palmdale*, No. BC483039, 2013 WL 7018376 (Aug. 27, 2013) [scheduling remedies *hearing* for 24 days after the court *mailed* its decision finding a violation of the CVRA])

Nor does section 10010 of the Elections Code help Defendant to excuse its failure to propose a remedy. Even if Defendant had started the process of drawing districts upon receiving this Court's November 8 Order on November 13, it could have adopted a district plan by November 30, with time to spare. Defendant could have had both of the initial public meetings required by section 10010(a)(1) that same week (November 14, 15 or 16) or even Monday of the following week (November 19). (See Gov't Code § 54956 [24 hours notice required for a special council meeting]). Then, after waiting the 7 days specified by section 10010(a)(2), Defendant could have had the two additional public hearings required by section 10010(a)(2) the week of November 26, completing the process in advance of its

November 30 brief. In short, if Defendant wanted to adopt a district plan in compliance with section 10010, it could have; it chose not to. Instead, upon receiving this Court's Tentative Decision and Order, Defendant focused its energy on criticizing this Court and declaring its intention to appeal. (Shenkman Supp. Decl. ¶ 2, Ex. A).

IV. DEFENDANT'S UNPRECEDENTED PLAN FOR ENDLESS DELAY IS NOT APPROPRIATE.

Rather than propose a remedy, Defendant instead suggests that this Court delay its selection of a remedy for years, and even then Defendant argues it could further delay implementation of that remedy by a matter of years while it pursues a second appeal challenging this Court's adoption of remedies. Under Defendant's plan: this Court would spend the next few months preparing a proposed statement of decision, addressing Defendant's objections and preparing what Defendant calls a "judgment of liability"; ***then*** two months after notice of entry of judgment, Defendant would initiate the appeal process by filing a notice of appeal; ***then*** between waiting for the docketing statement, submitting appellate briefs, oral argument, and waiting for the Court of Appeal's decision another year will have passed; ***then*** the losing side would likely seek review from the California Supreme Court, consuming at least a few more months (if the petition for review is denied) and perhaps more than a year (if the petition is granted); only ***then*** would this Court direct Defendant to contemplate a district map for another four months; ***then*** the parties would argue to this Court whether that district map and election timing are appropriate; ***and then*** either side could appeal the court's decision on the selection of remedies, requiring the whole appellate process to repeat. All of that would take at least 3 years, and perhaps as much as 6 years or more; all the while, according to Defendant, it could continue to impose the same at-large election system that this Court has found violates the CVRA and the Equal Protection Clause of the California Constitution.

Defendant's proposal defies commonsense and the consistent authority that mandates that voting rights violations be remedied promptly. (See, e.g., *Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317 ["*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their voting rights in the City of Dallas*."], emphasis in original). Moreover, just as a judgment for a plaintiff on a claim for breach of contract includes not just a finding that the defendant breached the contract but also the amount of damages, the judgment for a plaintiff in a voting rights

case should include not just a finding that the defendant's election system violates the voting rights of the plaintiffs but also the precise remedy for that violation, lest the case be subject to serial appeals and enforcement of voting rights be unnecessarily delayed. Of course, Defendant cites no authority for its proposed two-stage judgment designed to force the Court of Appeal to hear an interlocutory appeal addressing only liability; there is none. Rather, when trial courts have found a violation of voting rights, those courts promptly impose a remedy prior to entering any appealable judgment. (See, e.g., *Williams v. City of Texarkana* (W.D. Ark. 1992) 861 F.Supp. 756, 767 [finding Texarkana's at-large elections violated the FVRA and setting a prompt hearing to select remedies], aff'd (8th Cir. 1994) 32 F.3d 1265; *Larios v. Cox* (N.D. Ga. 2004) 300 F.Supp.2d 1320, 1356–1357; *Jauregui v. City of Palmdale*, No. BC483039, 2013 WL 7018376 (Aug. 27, 2013) [finding Palmdale's at-large elections violated the CVRA and setting a prompt hearing to select remedies])

A. At Least Some of Plaintiffs' Requested Relief Would Not Be Stayed By an Appeal.

Among other problems with Defendant's proposal is that it is based on the assumption that the entirety of what this Court might order will be automatically stayed pending Defendant's appeal(s). Defendant's assumption is wrong. If this Court were to adopt the remedies proposed by Plaintiffs, neither the prohibition against further at-large elections, nor the prohibition against unlawfully-elected council members serving beyond May 14, 2019 (or another date) would be stayed by an appeal.

While mandatory injunctions are generally stayed pending an appeal, it is well settled that prohibitory injunctions are not stayed. (*Wolf v. Gall* (1916) 174 Cal. 140, 142 ["By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitory injunction."]).[1] Where 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.* (See *Ohaver v. French* (1928) 206 Cal. 118, 123 [injunction prohibiting the defendants from feeding garbage to their hogs was prohibitory in nature, and therefore not stayed by the subsequent appeal, even though the inevitable consequence of the injunction

[1] See also *Union Pac. R. Co. v. State Bd. of Equalization* (1989) 49 Cal. 3d 138, 158 ["The writ was prohibitory and was thus not stayed by [defendant's] appeal."]; *Agricultural Lab. Rel. Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709 ["Prohibitory portions of an order are not automatically stayed pending appeal."]; *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal. App. 4th 455, 482 ["A prohibitory injunction is not stayed by an appeal."]

was to require the defendant to remove the hogs from their then-current location].) Here, both the prohibition against further at-large elections, and the prohibition against unlawfully-elected council members serving beyond a specified date, are prohibitory injunctions – they do not require Defendant to *do* anything, only that they *refrain* from certain activities. (See *Oiye v. Fox* (2012) 211 Cal. App. 4th 1036, 1048 [finding an injunction commanding that the defendant "not transfer any assets other than for normal business and necessities of life" to be prohibitory because "[i]t directs affirmative inaction by defendant, not affirmative action."]; see also *United Railroads of San. Fran. v. Sup. Ct.* (1916) 172 Cal. 80, 85). That Defendant has previously held at-large elections every two years and its unlawfully-elected council members are currently serving in that capacity, does not change the prohibitory nature of the injunctions sought by Plaintiffs. (See, e.g. *Jaynes v. Weickman* (1921) 51 Cal. App. 696 [injunction prohibiting a firm from using a disputed name held to be prohibitory even though in order to comply it was necessary for the defendant to remove the offending name].)

Moreover, the prohibition against unlawfully-elected council members serving beyond a date chosen by this Court would, pursuant to section 917.8(a) of the Code of Civil Procedure, not be stayed by a pending appeal even if it were construed to be a mandatory injunction. Section 917.8(a), an exception to the general rule that mandatory injunctions are stayed by an appeal, provides that "[t]he perfecting of an appeal does not stay proceedings" where there is an adjudication that someone is "unlawfully holding a public office … within this state." As this Court has (tentatively) ruled, none of the current Santa Monica council members have been lawfully elected; they were chosen through an unlawful and unconstitutional election system. Section 917.8(a) reflects the Legislature's intent that those who are not lawfully in public office, whether because they were not lawfully elected or they were convicted of a felony disqualifying them from holding public office, not be permitted to maintain the public office by prolonging appeals. That policy is also consistent with what federal courts have recognized in FVRA cases – the fundamental right to a lawfully-elected representative government is too important to allow a defendant to delay the implementation of a remedial plan. See, e.g., *Williams v. City of Dallas* (N.D. Tex. 1990) 734 F.Supp. 1317 ["*In no way will this Court tell African-Americans and Hispanics that they must wait any longer for their voting rights in the City of Dallas*."], emphasis in original).

1 **B. Defendant's Status as a Charter City Changes Nothing.**

2 Defendant also argues that the endless delay in its plan is warranted because "the Court [can] at 3 most order [Defendant] to fashion a districting plan, not itself do so." (Def. Brief, p. 11). Not true. 4 Section 14029 of the CVRA commands "the ***court*** shall implement appropriate remedies," not the 5 defendant. Section 14029 does not direct the court to ask a defendant, unwilling to acknowledge the 6 fault in its illegal and racially discriminatory elections, to pretty-please change that election system.

7 Nor does Defendant's status as a charter city, or anything in Defendant's charter, change the 8 Legislature's command that this Court implement appropriate remedies or impede this Court's ability 9 to implement the remedies it finds appropriate. In *Jauregui,* the Second District Court of Appeal held 10 that, because it addresses the statewide concerns of the right to vote, equal protection and the integrity 11 of the electoral process, the CVRA supersedes any conflicting city charter. (*Jauregui, supra,* 226 Cal. 12 App. 4th at 802). The *Jauregui* court also held that, as a remedial statute, the CVRA should be 13 "liberally or broadly construed" and gives the courts the power to remedy violations in at least the ways 14 that federal courts have responded to violations of the FVRA; that includes rejecting a defendant's 15 remedial plan and implementing its own plan over the defendant's objections. (*Id.* at 807-808; *Harvell* 16 *v. Blytheville Sch. Dist. No. 5* (8th Cir. 1997) 126 F.3d 1038, 1040 [affirming trial court's rejection of 17 defendant's district map, and adoption of plaintiffs' district map]; *Jauregui v. City of Palmdale*, No. 18 BC483039, 2013 WL 7018375 (Dec. 23, 2013) [rejecting the defendant's district map and adopting the 19 district map proposed by plaintiffs as appropriate to remedy the violation of the CVRA].) Then, 20 explicitly confirming that holding in *Jauregui*, the Legislature amended section 14026(c) of the CVRA 21 to make it crystal clear that the CVRA applies equally to charter cities just the same as all other 22 political subdivisions. (Assem. Bill 277 (2015) ["It is the intent of the Legislature that the [CVRA] 23 apply to charter cities … It is further the intent of the Legislature in enacting this act to codify the 24 holding in *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781."]) Defendant claims that 25 *Jauregui* "was wrongly decided" (Def. Br. p. 11), but the California Legislature disagrees with 26 Defendant, and, rightly or wrongly, it is controlling authority here.[2]

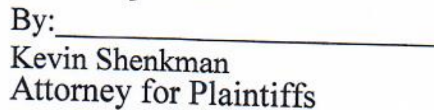
27

28 [2] Defendant's argument is even weaker in this case because this Court found that its at-large election system violates not only the CVRA but also the Equal Protection Clause of the California Constitution. The authority the California Constitution gives to charter cities (Art. XI, Sec. 5) cannot be read to give

V. The Seven-District Plan Is Appropriate.

Not only does Defendant not propose a district map of its own, it also does not dispute that the seven-district map developed by Mr. Ely (Tr. Ex. 261) properly follows all of the districting criteria enumerated in Section 21620 of the Elections Code. (See Pls. Opening Br. p. 5). Rather, Defendant only criticizes Mr. Ely for failing to solicit sufficient "community input." (Def. Br. P. 9). Even putting aside the hypocrisy of Defendant's argument in light of its own refusal to solicit any community input at all concerning its method of election or any district map, Defendant is simply wrong about Mr. Ely's process. Not only did Mr. Ely investigate and consider all of the socio-economic and historic features of Santa Monica (See, e.g, Tr. Exs. 155, 156, 158, 263) as he does in all of his districting work, he also toured the various neighborhoods of Santa Monica, speaking with residents along the way, and considered the input from dozens of community leaders solicited and compiled by Patricia Crane. (Tr. 301:14–302:27, 2685:3–2685:9.) This is *more* than Mr. Ely has done in other voting rights cases (e.g. *Jauregui v. City of Palmdale*) where his district maps have been adopted. Just as the courts in those cases have done, this Court should adopt Mr. Ely's district map.

Dated: December 4, 2018



By:______________________
Kevin Shenkman
Attorney for Plaintiffs

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license to charter cities to violate the rights given to every California citizen by the same California Constitution.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 28905 Wight Rd., Malibu, California 90265.

On December 4, 2018, I served true copies of the following document(s) described as

PLAINTIFFS' REPLY BRIEF RE: REMEDIES

on the interested parties in this action as follows:

GIBSON DUNN & CRUTCHER LLP
Theodore Boutrous Jr.
Marcellus McRae
Michelle Maryott
William Thomson
Kahn Scolnick
Tiaunia Henry
Helen Galloway
333 South Grand Avenue
Los Angeles, California 90071

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shenkman & Hughes' practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

and **BY EMAIL**, pursuant to the stipulation of the parties

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

Executed on December 4, 2018 at Thousand Oaks, California.

Kevin Shenkman

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA, Plaintiffs, v. CITY OF SANTA MONICA, and DOES 1 through 100, inclusive, Defendants.	CASE NO. BC616804 **SUPPLEMENTAL DECLARATION OF KEVIN SHENKMAN** Hearing Date: December 7, 2018 Hearing Time: 9:30 a.m. Dept.: 28 [Assigned to the Honorable Yvette Palazuelos]

DECLARATION OF KEVIN I. SHENKMAN

1. I, Kevin I. Shenkman, declare I am attorney licensed to practice law before all courts of the State of California, and I am a partner at Shenkman & Hughes P.C., attorneys of record for Plaintiffs in this case. The facts set forth in this declaration are within my personal knowledge and, if called upon to testify, I would competently testify as follows:

2. Attached hereto as Exhibit A is a true and correct copy of November 13, 2018 article in the Santa Monica Lookout. In that article, published the same day that counsel for both sides received this Court's November 8 Tentative Decision and Order, the Santa Monica Lookout reports that "[t]he decision to appeal [by Defendant] came about one hour after the parities in the lawsuit received a tentative ruling by Superior Court Judge Yvette M. Palazuelos against the City … ." The article also includes the statement by Defendant's counsel criticizing this Court – "'We are disappointed that [the ruling] contains no reasoning in support of the court's decision …' said Theodore J. Boutrous Jr., Gibson Dunn & Crutcher LLP."

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

Executed this 4th day of December, 2018, in Thousand Oaks, California.

Kevin Shenkman

EXHIBIT A

Santa Monica
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City Plans to Appeal Decision in Voting Rights Case

By Jorge Casuso

November 13, 2018 -- (*Updated at 2:48 p.m.*) The City of Santa Monica plans to appeal a Superior Court decision that it violated the California Voting Rights Act by discriminating against minority voters, City officials said Tuesday afternoon.

The decision to appeal came about one hour after the parties in the lawsuit received a tentative ruling by Superior Court Judge Yvette M. Palazuelos against the City and set a hearing to propose an appropriate remedy for December 7 (*"Plaintiffs Win Voting Rights Suit Against the City of Santa Monica,"* November 13, 2018).

"We are disappointed that (the ruling) contains no reasoning in support of the court's decision, which we believe is based on an unjustified adoption of the plaintiffs' misguided and unsupported view of the law," said Theodore J. Boutrous Jr., Gibson Dunn & Crutcher LLP.

"In accordance with the court's order, we will file briefing on the issue of remedies," Boutrous said. "Once the court's ruling is final, we plan to appeal, which will allow the California Court of Appeal to address the significant legal issues of first impression posed by this case."

Kevin Shenkman, the lead attorney for the plaintiffs -- Maria Loya and the Pico Neighborhood Association (PNA) -- has argued the City is throwing away taxpayer dollars by continuing to fight what is a losing cause.

"It's going to cost them a few million dollars more for their own attorneys and they'll end up paying us more," Shenkman told the lookout Tuesday.

In 2017, total fees to the Gibson, Dunn and Crutcher were nearly $5 million, according to the City's Finance Department (*"City of Santa Monica Enters Second Year of Fight Against Voting Rights Lawsuit,"* April 18, 2018).

Shenkman estimates the total fees paid to the defense firm could reach $10 million before the appeal.

In its statement, the City cited three reasons -- which it argued during the six-week trial -- why continuing to fight the lawsuit is appropriate.

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"First, as the closing briefs make clear, the trial in this case demonstrated that Santa Monica's at-large elections are fair, inclusive, and comply fully with California and federal law," City officials wrote in a statement.

"The reality is that Latinos have consistently been able to elect candidates of their choice to the City Council and other positions in Santa Monica."

The City also said replacing the current at-large election system with districts "will not meaningfully enhance Latino voting power or Latino political representation."

"It is impossible to draw a district in which Latino voters would form a majority," City officials said. "At the same time, concentrating Latino voters within a single district would leave Latino voters outside that district (the majority of Latino voters in Santa Monica) submerged in overwhelmingly white districts."

City officials also will argue that districts have been rejected by voters twice and would not work in a City the size of Santa Monica.

"Santa Monica voters have chosen the current at-large system for reasons that make sense," officials said. "Santa Monica voters have twice rejected proposals to move to district-based elections, in 1975 and 2002.

"A district system may work well in larger cities like Los Angeles, but dividing up Santa Monica's 8.3-square-mile community would pit neighborhood against neighborhood, encouraging legislative deal making to serve the interests of individual districts rather than the city as a whole."

In her tentative decision, Palazuelos also ruled in favor of the plaintiffs' claim that in 1946 and 1992 the City deliberately discriminated against minorities by refusing to implement district elections.

Plaintiffs attorney R. Rex Parris said the City is fighting a losing battle because it has not presented evidence that Santa Monica's vote has not been polarized.

"I don't see how they can expect to prevail," Parris said.

The plaintiffs are not required to draw a majority Latino district but "one that influences the outcome of elections," he said.

The City, Parris added, did not present a remedy during the trail in the event it lost.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 28905 Wight Rd., Malibu, California 90265.

On December 4, 2018, I served true copies of the following document(s) described as

SUPPLEMENTAL SHENKMAN DECLARATION

on the interested parties in this action as follows:

GIBSON DUNN & CRUTCHER LLP
Theodore Boutrous Jr.
Marcellus McRae
Michelle Maryott
William Thomson
Kahn Scolnick
Tiaunia Henry
Helen Galloway
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Los Angeles, California 90071

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shenkman & Hughes' practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

and **BY EMAIL**, pursuant to the stipulation of the parties

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

Executed on December 4, 2018 at Thousand Oaks, California.

Kevin Shenkman