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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' OPPOSITION TO MOTION TO TAX COSTS

[Declarations of Kevin Shenkman, Mary Ruth Hughes, R. Rex Parris, Milton Grimes and Robert Rubin filed concurrently herewith]

Date: June 25, 2019
Time: 9:30 a.m.
Dept.: 44

[Assigned for all purposes to the Honorable Yvette Palazuelos]

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I. INTRODUCTION

Having refused, through nearly three years of litigation and trial, to comply with the California Voting Rights Act ("CVRA"), and thus forcing Plaintiffs' counsel to expend thousands of hours of work and hundreds of thousands of dollars in out-of-pocket costs, Defendant still resists the consequences of its recalcitrance, including the payment of ***all*** of Plaintiffs' expenses. To encourage private attorneys to enforce the CVRA, the California Legislature provided that prevailing plaintiffs be awarded ***all*** of their attorneys' fees "and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs." (Elec. Code, § 14030.) Defendant can hardly complain now after three years of litigation and a six-week trial, that Plaintiffs, having prevailed at every stage, should bear the burden of their expenses.

Defendant's contrived arguments do not change that just result. Plaintiffs' memorandum of costs is not untimely, and even if it were untimely this Court has broad discretion to extend the deadline or excuse any untimeliness in order to avoid a forfeiture. The CVRA provides for the recovery of all expenses by prevailing plaintiffs, not just those enumerated in Section 1033.5 of the Code of Civil Procedure. And all of Plaintiffs' expenses itemized in their memorandum of costs, were reasonably incurred in this exceptionally hard-fought important case.

II. BACKGROUND - THE LITIGATION, TRIAL AND JUDGMENT

With their months-long efforts to convince Defendant to change its unlawful racially-discriminatory election system having proven to be futile, Plaintiffs filed this case in April 2016. (Shenkman Decl. ¶¶ 4, 5, Ex. A.) From the outset, this case was contentious, time consuming and expensive. Touting its vast financial resources, Defendant retained the high-priced law firm of Gibson Dunn & Crutcher LLP, and that firm spared no expense. (See *id*. at ¶ 6, Ex. B.) Nearly three years of litigation followed, including: two pleading challenges; extensive fact and expert discovery; 32 depositions; more than three dozen motions; three writ petitions; a petition for review to the California Supreme Court; a six-week trial; and a series of hearings regarding remedies. (*Id.* at ¶ 7.)

Ultimately, the Court found in favor of Plaintiffs on both of their claims—for violation of the CVRA and the Equal Protection Clause of the California Constitution—marking the first time an at-large election system in California has been found to be intentionally discriminatory. (*Id.* at ¶ 9, Exs. C, D.) Following a series of hearings regarding remedies, judgment was finally entered on February 13, 2019. On March 28, 2019 Plaintiffs served the Notice of Entry of Judgment, and the following day

they filed their Memorandum of Costs. (*Id.* at ¶ 10, Exs. G, H.) The Memorandum of Costs is verified and details Plaintiffs' expenditures in this three-year litigation through entry of judgment.[1]

III. PLAINTIFFS' MEMORANDUM OF COSTS IS NOT UNTIMELY

Ignoring the controlling authority of the California Supreme Court, Defendant contends that Plaintiffs forfeited their rights to recover any of their expenses because, according to Defendant, Plaintiffs' memorandum of costs was filed four weeks late. Defendant's contention has no basis in the law, and is nothing more than Defendant's wishful thinking.

California Rule of Court 3.1700(a)(1) provides in relevant part:

> A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first.

In this case, entry of judgment occurred on February 13, 2013, but the Notice of Entry of judgment was not served until March 28, 2019. (Shenkman Decl. Exs. A and B.) Plaintiffs filed their Memorandum of Costs the very next day—well before the deadline of Rule 3.1700 (April 17, 2019). Defendant attempts to avoid that result by arguing that the time to file a memorandum of costs was triggered by the court clerk's mailing of what the clerk called a "Minute Order." In *Van Beurden Ins. Servs. Inc. v. Customized Worldwide Weather Ins. Agency Inc.* (1997) 15 Cal.4th 51, the California Supreme Court rejected Defendant's view.

As Defendant apparently concedes, in order for a clerk to trigger the time for filing a memorandum of costs, the clerk must serve "the *notice of entry of judgment*" and that service must be "*under Code of Civil Procedure section 664.5*." (Cal. Rules of Court, rule 3.1700, subd. (a)(1), italics added.) Prior to the California Supreme Court's decision in *Van Beurden* the intermediate appellate courts were split on what constituted service of the notice of entry of judgment under Code of Civil

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[1] Defendant criticizes Plaintiffs for not providing more explanation and documentation to substantiate their litigation expenses with their Memorandum of Costs. But the law is clear on this point—where a costs memorandum is verified by counsel, no supporting documentation is required at all. (*Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 308.) Nonetheless, Plaintiffs provide detailed supporting documentation for the expense items challenged by Defendant. (Shenkman Decl., Exs. L, M, O; Parris Decl., at ¶¶ 2–16; Rubin Decl. Exs. A, B; Grimes Decl. Ex. A). However, for some expenses (e.g. mileage), no supporting documentation exists and Plaintiffs' law firms only require their attorneys and staff to report their reimbursable mileage and other minor expenses. This is eminently reasonable and comports with the business practices required by the Internal Revenue Service. (See *Internal Revenue Service Publication 463* (2018), p. 24 (receipts not required for expenses under $75.00.)

Procedure section 664.5. (See *Van Beurden*, *supra*, 15 Cal.4th at pp. 62–65.) Recognizing the need for clarity on post-judgment deadlines, and no doubt appreciating California's public policy against forfeitures, the California Supreme Court agreed with the Court of Appeal's decision in *S M Trading, Inc. v. Kono* (1988) 198 Cal.App.3d 749, holding that a clerk triggers post-judgment deadlines "**only** by mailing to the parties an **additional** 'notice of entry' **which states the notice is given under section 664.5**." (*Van Beurden*, at p. 62.) The California Supreme Court concluded: "We agree [with Justice Benson's decision in *S M Trading*], and hold that to qualify as a notice of entry of judgment under Code of Civil Procedure 664.5, the clerk's mailed notice must affirmatively state that it was given 'upon order by the court' or 'under section 664.5' and a certificate of mailing the notice must be executed and placed in the file." (*Ibid*.)[2]

Here, the clerk mailed a minute order, the Judgment and the Statement of Decision, with an attached certificate of mailing. None of those documents reference CCP section 664.5, nor do any of those documents include a statement by the clerk that the mailing of any notice was done "upon order by the court," as the California Supreme Court held is required to trigger post-judgment deadlines. (Shenkman Decl. Exs. C, D, E, F; *Van Beurden, supra,* 15 Cal.4th at pp. 64–65.) On the contrary, the certificate of mailing by the clerk does not even state that any "notice of entry of judgment" was served; instead, it states that a minute order was served. (Shenkman Decl., Ex. F). Moreover, there is no "notice of entry" that is "additional" to the minute order, as required by *Van Beurden*. (*Id.* at ¶ 9; *Van Beurden*, *supra*, at p. 62.)[3] [4]

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[2] Defendant may, in its reply, try to confuse this Court by citing to *Palmer v. GTE California Inc.* (2003) 30 Cal.4th 1265, and claim that even the service of a copy of the judgment, with nothing more, triggers post-judgment deadlines. But *Palmer* is only applicable to a notice of entry of judgment served by a party, not by a court clerk, and distinguishes *Van Beurden* on that basis. It would be legal error to apply the more lax requirements of notice by a party, explained in *Palmer*, to the mailing by the court clerk in this case, governed by *Van Beurden*.

[3] Defendant argues that Plaintiffs' service of a proper notice of entry of judgment on March 28, 2019 evidences that, in Defendant's words, "Plaintiffs seemingly recognized their own untimely filing." Not so. On the contrary, Plaintiffs recognized that the clerk's mailing did not trigger certain post-judgment deadlines, and so Plaintiffs filed and served a proper notice of entry of judgment to trigger those deadlines - exactly what the California Supreme Court approved of in *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894. (See *id.* at 905 ["the clerk's mailing of these documents did not commence the 60-day period for the filing of a notice of appeal. Instead, the relevant 60-day period began when Honda filed its own, proper notice of entry on January 17, 2003."])

[4] Moreover, that the clerk's mailing of the February 13, 2019, minute order does not constitute "service of notice of entry of judgment … under Code of Civil Procedure section 664.5" is made clear by the fact that the minute

As conceded by Defendant, Plaintiffs filed and served their memorandum of costs on March 29, 2019. (Motion, p. 4). March 29, 2019 was within 15 days of "a party's service of notice of entry of judgment" (Defendant's Motion, p. 5), which occurred just one day earlier, and "within 180 days after entry of judgment," and the clerk's actions were not sufficient to constitute "service of the notice of entry of judgment . . . under Code of Civil Procedure section 664.5," so Plaintiffs' memorandum of costs is timely. (Cal. Rules of Court, rule 3.1700, subd. (a).)

A. This Court Can Extend the Costs Memorandum Deadline By 30 Days

Furthermore, even if the clerk's mailing of the February 13, 2019, minute order were regarded as "service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5," it would still be well within this Court's discretion to extend the time for Plaintiffs' memorandum of costs. Rule 3.1700(b)(3) provides in relevant part: "the court may extend the times for serving and filing the cost memorandum … for a period not to exceed 30 days." Even under Defendant's wishful thinking calculation of the deadline to file the memorandum of costs (which, as discussed above, is wrong), the memorandum of costs was not due until March 5, 2019. (Motion, p. 4.) A thirty-day extension brings the deadline to April 4, 2019, and Plaintiffs filed and served their memorandum of costs six days *before* that date. As the court held in *Cardinal Health 301, Inc. v. Tyco Elecs. Corp.* (2008) 169 Cal. App. 4th 116, a trial court can, and should, extend the deadline to file a costs memorandum on its own motion where there is any confusion regarding the event triggering the time to file the costs memorandum. (*Id.* at pp. 154–155.)

In *Cardinal Health*, "[d]uring trial, the court granted [one defendant] a nonsuit on all of [Plaintiff]'s claims" and on August 1, 2006 that defendant "served a file-stamped copy of the trial court's order granting the nonsuit." (*Id.* at p. 154.) Judgment was entered on the remainder of Plaintiff's claims a week later, and notice of entry of judgment was served on August 14, 2006. (*Ibid.*) The defendant that was granted the nonsuit "filed its costs memorandum on August 29, 2006" – within

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order directs: "Counsel for plaintiff[s] shall give notice to all others not listed." (Shenkman Decl. Ex. E). When a clerk serves a notice of entry of judgment under Section 664.5, service is "to all parties who have appeared in the action." (Code Civ. Proc., 664.5, subds. (a)–(b).) Here, the clerk's certificate of mailing shows that the minute order was sent to only some of the counsel who appeared in the action; Plaintiffs' counsel gave notice to all of the others. (Shenkman Decl. ¶ 9). The minute order constituted "entry of judgment" but not "notice of entry of judgment"—two events that Rule 3.1700 regards as being significantly different—so it only triggered the 180-day deadline, not the 15-day deadline, of rule 3.1700(a).

15 days of the notice of entry of judgment, but 28 days after the service of a file-stamped copy of the nonsuit order. (*Ibid.*) Rather than wade into the complicated issue of which event triggered the deadline to file the costs memorandum, the *Cardinal* court simply noted that with a thirty-day extension, which is authorized by rule 3.1700(b)(3), the costs memorandum was unquestionably timely. (*Id.* at p. 155.)

Anthony v. City of Los Angeles, (2008) 166 Cal.App.4th 1011 is also instructive. In *Anthony,* the prevailing plaintiff filed a motion for an award of fees and costs twenty-five (25) days after service of the notice of entry of judgment. (*Id*. at 1014). The *Anthony* court noted that even if the costs claimed in the motion should have been included in a costs memorandum, the trial court still could have extended the deadline pursuant to Rule 3.1700(b)(3) to make that request timely. (*Id.* at 1016, fn. 2). In an attempt to portray the deadline of Rule 3.1700(a) to the contrary – as an unwavering trap that commands the forfeiture of all costs when it is missed by any length of time – Defendant cites *Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, *Davis Lumber Co. v. Hubbell* (1955) 137 Cal.App.2d 148, and *Sanabria v. Embrey* (2001) 92 Cal.App.4th 422. None of those cases help Defendant here.

In *Hydratec*, the prevailing party failed to object to a proposed judgment that stated each party shall bear its own fees and costs, that proposed judgment was signed by the court, and the prevailing party *never* filed a memorandum of costs or fees motion. (*Id.* at pp. 927–928.) On that basis, the *Hydratec* court found that the prevailing party had waived any right to fees or costs. (*Id.* at pp. 928–929.) Here, of course, unlike in *Hydratec,* the Judgment provides that Plaintiffs are entitled to recover their fees and costs (Judgment, ¶ 11), and Plaintiffs have filed both a memorandum of costs and a fees motion. In *Davis Lumber*, the court specifically recognized that "the court may extend the time to file a cost bill, and that where the bill is not filed in time relief may be given, in a proper case, under section 473, Code of Civil Procedure," and then ultimately ruled "the cost bill was therefore filed within time, [and] [t]he order striking same was erroneous." (*Davis Lumber*, *supra*, 137 Cal.App.2d at pp. 151, 153.) Finally, in *Sanabria*, the prevailing defendant filed her memorandum of costs nearly six months after service of the notice of entry of dismissal. (*Sanabria*, at p. 424.) The *Sanabria* court had no occasion to consider the propriety of granting a thirty-day extension of the deadline for filing a memorandum of costs—it would have made no difference, as the costs memorandum was five months late. (*Ibid.*) Nor did the *Sanabria* court have any occasion to consider whether relief under section 473 (addressed below) might be appropriate, because that relief was never sought. (See generally *ibid.*)

B. Even If the Memorandum of Costs Were Untimely, *and* Even If This Court Declines to Extend the Costs Memorandum Deadline Pursuant to Cal. R. Ct. 3.1300(b)(3), the Untimeliness Is Excusable Pursuant to CCP § 473

As even Defendant concedes in its motion, Code of Civil Procedure section 473 may excuse any untimeliness of Plaintiffs' memorandum of costs due to "mistake, inadvertence, surprise or excusable neglect." (Motion, p. 1). "In the absence of prejudice, the trial court has broad discretion in allowing relief on grounds of inadvertence from a failure to timely file a cost bill." (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 375, 381; see also *Gunlock Corp. v. Walk on Water, Inc.* (1993) 15 Cal.App.4th 1301, 1304 ["a trial court has broad discretion in allowing relief from a late filing [seeking fees or costs] where, as here, there is an absence of a showing of prejudice to the opposing party."]; *Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d 485, 487–488 [same].)[5]

Here, if Plaintiffs' costs memorandum was late, that tardiness was due to Plaintiffs' counsel's justifiable belief (based on the authority discussed above in Section III.A infra) that the clerk's mailing of the minute order did not trigger the deadline of rule 3.1700(a). If that belief was wrong, it is certainly excusable. Defendant does not point to any prejudice from the minor delay of approximately three weeks—between the time Defendant claims the memorandum of costs should have been filed (March 6), and the time it was filed (March 29)—nor could it, as there is no prejudice. (Compare *LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 169–170 [affirming trial court's grant of relief under section 473 where memorandum of costs was filed 22 days late due to counsel's mistaken belief that the opposing party's notice of appeal stayed the time for filing a memorandum of costs and his busy schedule]; *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1188, 1189–1190 [affirming trial court's grant of relief under section 473 for late filing of costs memorandum and fees motion, where memorandum of costs was 46 days late due to attorney's mistaken belief that deadline was "sixty days from [his] receipt of the Notice of Entry of Judgment."].)[6]

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[5] Courts frequently consider documents that have been untimely filed to avoid "the expenditure of unnecessary time and money for the preparation of later section 473 motions." (*Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32.)

[6] In a footnote, Defendant argues that relief under section 473 should be unavailable to Plaintiffs because earlier in this case Defendant's motion under section 473 to excuse its untimely service of its summary judgment motion was denied, and the unsupported opinions of its "supplemental" expert were limited. But, Defendant cites no authority for its novel argument, and ignores the very different circumstances addressed by this Court in

With absolutely no prejudice to Defendant, and a reasonable belief that the memorandum of costs was not due until April 12, 2019, any tardiness should be excused pursuant to Section 473. (See *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 30 [It is a proper exercise of discretion to relieve attorneys from tardy filings when the attorney's conduct was reasonable].)

C. The Deadline of Rule 3.1300(a) Does Not Apply to Most of Plaintiffs' Costs.

Finally, even if the clerk's mailing of the minute order triggered the deadline for filing a memorandum of costs, and even if this Court declines to extend Plaintiffs' time for filing a memorandum of costs pursuant to rule 3.1300(b)(3), and even if this Court declines to grant Plaintiffs relief under Section 473, that would only affect a small portion of Plaintiffs' expenses.

As the Second District Court of Appeal held in *Anthony v. City of Los Angeles*, (2008) 166 Cal.App.4th 1011, the 15-day deadline of "rule 3.1700 applies only to the items 'allowable as costs' that are listed in subdivision (a) of section 1033.5." (*Id.* at pp. 1015, 1016 ["We therefore conclude, as did the trial court, that Anthony was not required to claim her expert witness fees within the 15-day time constraint imposed by rule 3.1700 for filing a memorandum of costs."].) Other "costs" are recoverable where allowed by statute—FEHA in *Anthony*, and the CVRA in this case—and the deadline for seeking to recover those costs is the same as the deadline for seeking attorneys' fees. (*Id.* at pp. 1016–1017; see also *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1099 [noting that computerized legal research is properly awarded in connection with a fees motion].) Here, the parties agreed to extend the time for Plaintiffs to seek recovery of their attorneys' fees to June 3, 2019, and Plaintiffs filed their memorandum of costs seeking recovery of expenses other than those listed in Code of Civil Procedure section 1033.5(a) well before that date. (Shenkman Decl. ¶ 10).

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those instances. Defendant's 473 motion was denied because Defendant's counsel never acknowledged that they had made a mistake; instead Defendant argued (incorrectly) that its service of the summary judgment motion was proper and that it didn't make any arguments about waiver in its reply brief as a strategy decision. (Shenkman Decl. Ex. I). The Court's decision to limit the scope of testimony from Alan Lichtman is even less helpful to Defendant's argument – Dr. Lichtman was permitted to testify (over Plaintiffs' objections) as a supplemental expert despite the fact that there was no justification for Defendant's failure to include Dr. Lichtman on its original expert designation; he just wasn't allowed to testify on the subjects already addressed by Defendant's other experts who were properly designated to address those subjects, or the opinions he developed after his deposition. (Shenkman Decl. Ex. J). A contrary ruling in either instance would have greatly prejudiced Plaintiffs; in contrast, excusing any tardiness in Plaintiffs' filing of the memorandum of costs would not cause any prejudice to Defendant.

IV. THE CVRA PROVIDES FOR PLAINTIFFS' RECOVERY OF EXPENSES BEYOND THOSE ENUMERATED IN CCP SECTION 1033.5

To encourage private attorneys to protect the voting rights of minority citizens, the CVRA explicitly provides for the recovery of attorneys' fees and expenses by a prevailing plaintiff:

> In any action to enforce [the CVRA], the court **shall** allow the prevailing plaintiff party, … a reasonable attorney's fee … **and litigation expenses *including, but not limited to*, expert witness fees and expenses as part of the costs.**

(Elec. Code, § 14030, emphasis added.)

Despite the broad language of the CVRA providing for the recovery of ***all*** litigation expenses, Defendant argues that Plaintiffs should only be permitted to recover costs enumerated by Section 1033.5 of the Code of Civil Procedure. But Section 1033.5 applies only to costs sought "under [CCP] Section 1032," not Elections Code section 14030, and contemplates that even the items excluded as costs by section 1033.5(b) are recoverable if otherwise "authorized by law." Defendant's argument that section 1033.5 excludes the recovery of certain costs in this case defies the language of the CVRA and legal authority from both the California and federal courts.

That the CVRA provides for the recovery of litigation expenses beyond what is allowed under Section 1033.5 is clear from the one example of a "litigation expense" that is explicitly mentioned in the text of the CVRA—"expert witness fees and expenses." (Elec. Code, § 14030.) Under Section 1033.5, expert witness fees are not allowable as costs, yet under Section 14030 of the CVRA "expert witness fees and expenses" are explicitly recoverable "as part of the costs." (Compare Code Civ. Proc., §1033.5, subd. (b)(1) with Elec. Code, § 14030.) Defendant appears to concede this point, but seeks to limit the effect of section 14030 to just expert witness fees and expenses. However, Defendant's unduly narrow reading of section 14030 contradicts its express language. Specifically, that expert witness fees and expenses are only one category of expenses that is allowable under section 14030 is made clear by the immediately preceding phrase, "including, but not limited to." Moreover, the courts have held that subdivision (b) of Section 1033.5 does not prohibit the recovery of even expenses that fall precisely in one of the categories expressly enumerated in that subdivision, where, as here, another statute provides for the recovery of "attorneys' fees and costs," generally. (See *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1167)

The Second District Court of Appeal's decision in *Anthony v. City of Los Angeles*, (2008) 166 Cal.App.4th 1011, 1017 confirms this commonsense construction—that the CVRA allows for the recovery of all litigation expenses even if not allowable under Section 1033.5. In *Anthony*, relying on

Section 1033.5, the defendant argued that fees for expert witnesses not ordered by the court were not properly recoverable under California's Fair Employment and Housing Act ("FEHA"). (*Ibid.*) The trial court, and the Court of Appeals, both rejected that argument, noting that FEHA provides for the recovery of costs beyond those allowable under Section 1033.5. *Id.* The same is true with the CVRA. In fact, in one of the few appellate cases regarding the CVRA, the Court of Appeals likened the CVRA to FEHA. *Sanchez v. City of Modesto Sanchez* (2006) 145 Cal.App.4th 660, 666 ["[The CVRA] is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act."].)

Not only does FEHA provide for the recovery of litigation expenses beyond those enumerated by Section 1033.5, the federal Civil Rights Act—the other statute to which the *Sanchez* court likened the CVRA—likewise provides for the complete recovery of out-of-pocket litigation expenses, even those that are not recoverable as statutory costs. (See, e.g., *Henry v. Webermeier* (7th Cir. 1984) 738 F.2d 188.) In *Henry*, the plaintiff's counsel in a case brought under the federal Civil Rights Act incurred "$29,116.79 in out-of-pocket expenses incurred for investigation, travel, and other activities related to case preparation, of which $5,378.87 represented costs taxable under 28 U.S.C. § 1920." (*Id.* at p. 191.) "The district judge held that the plaintiffs were not entitled to reimbursement of any out-of-pocket expenses other than statutory costs," but Judge Posner, writing for a unanimous court, reversed the district court's holding. (*Ibid.*) Judge Posner reasoned that the purpose of the Civil Rights Act (much like the CVRA) requires that all litigation expenses be awarded to a prevailing plaintiff:

> The Act seeks to shift the cost of the winning party's lawyer (in cases within the intended scope of the Act) to the losing party; and that cost includes the out-of-pocket expenses for which lawyers normally bill their clients separately, as well as fees for lawyer effort. The Act would therefore fall short of its goal if it excluded those expenses.

(*Id.* at p. 192.) For its contrary view, Defendant relies entirely (as it does for a variety of propositions) on a single case—*Ladas v. Cal. State Auto Ass'n* (1993) 19 Cal.App.4th 761. But the *Ladas* court addressed a costs award in a breach of contract case in which there was no contractual or statutory provision providing for an award of fees or costs, other than Code of Civ. Proc. § 1032. (*Id.* at p. 767).

All of the litigation expenses included in Plaintiffs' memorandum of costs—e.g. travel expenses, court reporters, and messengers—are the type of out-of-pocket expenses for which lawyers generally bill their clients separately. In fact, the expenses sought by Plaintiffs here are exactly the type of out-of-pocket expenses that *Defendant's* counsel bills its clients separately. (See Shenkman Decl. ¶ 29, Ex. R). Similar to the federal Civil Rights Attorney's Fees Awards Act, Section 14030 of the

CVRA seeks to encourage private attorneys to protect the voting rights of minority citizens. That goal is best served by providing for the recovery of ***all*** litigation expenses—exactly what the language of the CVRA provides.

Even absent the Legislature's express instruction in the CVRA and the policy of fully compensating successful plaintiffs in civil rights cases like this one, nearly all of Plaintiffs' costs would still be recoverable. In addition to the items specifically listed in Section 1033.5(a) (e.g. filing and motion fees, court reporting fees, among others), subsection 1033.5(c)(4) provides that "[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (See also *City of Anaheim v. Dept. of Transportation* (2005) 135 Cal.App.4th 526, 534 [listing an exemplary list of the broad range of such recoverable costs].) Essentially, the Court can approve any costs "reasonably necessary to the conduct of the litigation." (*Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 364 [approving photographs and blueprints]; see also *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1099 [holding that computerized legal research is recoverable under Section 1021.5].) "[T]he prevailing party is entitled to all of his costs unless another statute provides otherwise. [Citation.] Absent such statutory authority, the court has no discretion to deny costs to the prevailing party." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129.)

With respect to many of its objections to Plaintiffs' expenses, Defendant does not challenge the fact that those expenses were reasonably incurred in pursuit of the litigation. Rather, Defendant merely contends that because those costs are not allowable under Section 1033.5 they should be prohibited here. Specifically, that is Defendant's only objection to the costs of: court reporters and transcripts ($54,008.77)[7]; copying, postage and overnight delivery ($7,215.44), photographer and dropbox ($432.89), conference call service ($40.57), and computerized legal research[8] ($8,825.00). Because

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[7] Defendant also claims the amount for trial transcripts is excessive because it was billed a slightly lesser amount. Not so. Plaintiffs are disturbed by the apparent fact that the court reporter company that Defendant's counsel hired, and has a continuing relationship with Defendant's counsel, charged Plaintiffs more than it charged Defendant. But that apparently dishonest business practice is no reason to now deny Plaintiffs recovery of the amount they were charged.

[8] The fallacy of Defendant's argument is perhaps best illustrated by its objection to Plaintiffs' expenses for computerized legal research. Defendant strains to characterize computerized legal research as being "investigation expenses in preparing the case for trial" and argues that Section 1033.5(b)(2) precludes such costs to be reimbursed. But the court in *Plumbers & Steamfitters, Local 290, supra* makes clear that computerized legal research expenses are recoverable. (*Id.* at 1099; see also See *Moore v. IMCO Recycling of CA, Inc.* (C.D.

Defendant's only objection to these litigation expenses defies the language of the CVRA and the applicable case authority, those expenses should all be allowed by this Court.[9]

Even if some of these litigation expenses are not recoverable as "costs," they are still recoverable as "attorney fees" under both Section 14030 of the CVRA and Code of Civil Procedure Section 1033.5. For example, the expense of computerized legal research may be more appropriately characterized as "fees" rather than "costs." (See, e.g., *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1099.) As Judge Posner noted in *Henry*, "the line between fees and expenses is arbitrary." *Henry*, 738 F.2d at 192. In this case, it is undisputed that Plaintiffs are entitled to not only their "costs" but also their attorneys' fees, and Plaintiffs' motion for attorneys' fees is scheduled to be heard on August 28, 2019. Whether the expenses claimed by Plaintiffs here are "costs" or "fees," the result is the same—Plaintiffs are entitled to recover these amounts. (See *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162 [reversing trial court's disallowance of expenses for "messenger and express mail charges; telephone bills; travel expenses for mileage, tolls and parking; [etc.]."]; see also *California Recreation Industries v. Kierstead* (1988) 199 Cal.App.3d 203, 209 [finding no prejudice to defendant, where plaintiff sought an award of attorneys' fees through a memorandum of costs rather than a noticed motion].)

V. PLAINTIFFS' COSTS WERE REASONABLY INCURRED IN THIS IMPORTANT CASE

This case was exceptionally hard-fought. By the time judgment was entered, Plaintiffs had been forced to navigate two pleading challenges, extensive fact and expert discovery including 32 depositions, dozens of motions, constitutional challenges, three writ petitions, a petition for review to the California Supreme Court, a six-week trial, and a series of hearings regarding remedies. In any case, items listed on a verified memorandum of costs are presumed to be reasonably necessary. (See *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131 ["If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to so show that they are not reasonable or

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Cal. 2005) WL 5887180, at *3 ["section 1033.5 was enacted well after computerized research became standard. If the legislature had wanted to preclude such fees in all cases, it could easily have used that phrase."]).

[9] The Court has discretion to apply a multiplier to the costs, particularly in light of the contingent risk that if they did not prevail Plaintiffs' counsel would never recover their costs. (*Downey Cares v. Downey Comm. Dev'l Commission* (1987) 196 Cal.App.3d 983, 998 [upholding 1.5 multiplier applied to costs].) If the Court were to deny any item of costs in this matter, it should exercise its discretion to make up for such items by applying a multiplier to the remaining costs. This would be warranted given the civil rights nature of this case and the pro bono nature of the representation by Plaintiffs' counsel.

necessary."]; *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 699 [items on a verified cost memorandum that appear to be proper are prima facie evidence of necessity].) In this extraordinarily contentious case, in which Defendant and its counsel both have seemingly unlimited resources with which to fight, that presumption makes even more sense.

A. Expert Witnesses

To prevail in this extraordinary case, Plaintiffs assembled a team of renowned experts, whose opinions have been relied upon in some of the most notable voting rights cases, including every one of the CVRA cases to go to trial. (Shenkman Decl. ¶ 13, Ex. K) In this case too, the Court found their testimony helpful and credible, and largely adopted their opinions, as demonstrated by the Court's Statement of Decision. (*Id.* at ¶ 14). While the amount billed by these experts in this case is greater than what they billed in previous CVRA cases, it was the spare-no-expense approach of Defendant and its counsel that necessitated their work; for example, just one of those experts (Dr. Kousser) was cross-examined by Defendant's counsel for 4½ days of trial and two days of deposition. (*Id.*). Moreover, unlike any previous CVRA case, this case included a claim under the Equal Protection Clause, and therefore required an intensive historical analysis of discriminatory intent. Submitted with this opposition are the invoices of Plaintiffs' experts, which have already been paid by Plaintiffs' counsel. (*Id.* at ¶ 15, Ex. L).

Still trying to shirk the consequences of its stubborn insistence on maintaining its illegal and discriminatory election system, Defendant claims that some (unidentified) portion of these expert witness fees is unreasonable. But the only thing that Defendant can even claim was unreasonable is Dr. Kousser's attendance at the deposition of Alan Lichtman, pointing to one small portion of that deposition. (Motion, p. 14). In truth, Dr. Kousser's attendance was critical at that deposition – to help Plaintiffs' counsel to explore Dr. Lichtman's opinions, particularly in light of the fact that his opinions were unknown because Dr. Lichtman did not prepare a report in this case even though he had prepared a report in every one of the dozens of other cases in which he had ever testified. (*Id.* at ¶ 16). Indeed, Defendant's own conduct demonstrates the reasonableness of Dr. Kousser attending that deposition – Dr. Lichtman was present for Dr. Kousser's many days of trial testimony (even though he resides in Washington D.C.) taking notes and assisting Defendant's counsel. (*Id.*)

B. Trial Exhibits

Because Defendant forced Plaintiffs to prove their case at trial, binders of trial exhibits had to be prepared, and the cost of those trial exhibits and binders are detailed in invoices. (Parris Decl., at ¶¶ 2,

7, Exs. 1 and 6.) Nonetheless, Defendant claims that because some exhibits were not admitted into evidence, Defendant should only be required to reimburse only 39% of these costs. There is no authority for such a reduction, or rough calculation. Rather, the reasonableness of an expenditure must be considered "from the pretrial vantage point of a litigant," and not from some point after the trial is complete. (*Brake v. Beech Aircraft Corp*. (1986) 184 Cal. App. 3d 930, 940). Before trial began, Plaintiffs did not know which exhibits they would need, nor did Defendant, as demonstrated by the fact that only 84 of the 637 exhibits on its list were admitted into evidence. (Shenkman Decl. ¶ 18).[10]

C. Travel, Mileage and Parking

Plaintiffs' counsel necessarily incurred expenses for travel (mileage, parking, airfare) from their offices – located in Lancaster, Malibu, San Francisco and South Los Angeles – to various events in this case – trial, depositions, discovery referee hearings, mediation, witness meetings, etc. Submitted with this opposition are detailed explanations for all of those travel expenses. (Shenkman Decl. ¶ 19, Ex. M; Parris Decl., at ¶ 16, Ex. 15; Rubin Decl. Exs. A, B; Grimes Decl. Ex. A). Upon review of those records, Plaintiffs discovered that $981.41 of travel expenses were actually attributable to a different case, and withdraw that portion of their costs request. Defendant's counsel also bills separately for travel expenses, but inexplicably objects to Plaintiffs' counsel doing the same. (*Id.* at ¶ 29, Ex. R).

Though Defendant objects to all travel expenses, it raises only two principal complaints that those expenses are unreasonable: 1) that two of the attorneys who incurred travel expenses did not take a visible leadership role in the trial; and 2) that it was discourteous for Plaintiffs to take depositions in Lancaster. Neither of Defendant's gripes has any merit. This extraordinarily contentious case required Plaintiffs to retain counsel from several firms to compete with the extraordinary resources of Defendant and Gibson Dunn & Crutcher, some of the attorneys necessarily filled non-visible roles, such as brief-writing and investigation. Defendant's counsel likewise had several attorneys working on this case who never said a word at trial or any deposition (e.g. Theodore Bourtrous, William Thomson, Marissa

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[10] The lone case cited by Defendant for the opposite view – *Ladas v. Cal. State Auto Ass'n* (1993) 19 Cal.App.4th 761 – does not help Defendant. That "case was dismissed before trial," and so there was no need for trial exhibits at all. (*Ladas*, *supra*, 19 Cal.App.4th at p. 775) Implicit in the ultimate judgment is that the Court found Plaintiffs' exhibits and demonstratives helpful to arriving at its conclusion. (See e.g. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1057 [while high-tech, methods used to display documents were highly effective, efficient, and commensurate with nature of case; no abuse of discretion under these circumstances to award $19,307.33]; *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1104 [no abuse of discretion in awarding $57,969 for graphic exhibit boards and another $101,908 for video to help jury appreciate difference between manual and computer-assisted dispatch system].)

Moshell and Miguel Loza). Those attorneys too needed to travel for various case tasks, such as witness and client meetings to fulfill their roles.[11] Plaintiffs' travel costs also cannot be avoided because they are somehow connected to something Defendant's counsel claims was "discourteous." In any event, taking depositions at Plaintiffs' counsel's office in Lancaster is not discourteous at all – it is squarely permitted by Code of Civil Procedure section 2025.250 – and it was *Defendant* that refused to agree to mutually accommodate witnesses' preferences for deposition location. (*Id.* at ¶ 21, Ex. N)

D. Lodging

Defendant's only complaint concerning the reasonableness of Plaintiffs' costs for lodging is that the rates paid by one of Plaintiffs' attorneys, who stayed at one small hotel, were less than those paid by some of Plaintiffs' other attorneys. (See Mot., at pp. 11–12.) For the sake of compromise, Plaintiffs will reduce the amount requested for lodging to $24,219.00—reflecting the lowest rate the Parris Law Firm was able to obtain during the entire trial ($299.00 per night). (Parris Decl., at ¶ 16.)

E. Meals

Though meals may not be a necessary expense in some cases, they were reasonably necessary in this case. (See *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 541 ["We do not understand *Ladas* to establish an absolute rule prohibiting reimbursement for attorney meal expenses under any and all circumstances."].) Unlike in *Ladas* – the only authority cited by Defendant for its view that meal expenses are not recoverable – meals during trial (August 1 – September 13, 2018) had to be at a restaurant that could accommodate Plaintiffs' several attorneys and witnesses to allow preparation for the afternoon trial session (in *Ladas* the case was dismissed before trial began), and meal invitations were necessary to get witnesses to talk with Plaintiffs' counsel in spite of Defendant's political pressure. (Shenkman Decl. ¶ 22).

F. War Room

Defendant similarly criticizes Plaintiffs' rental of a war room during trial, but ignores the purpose of the war room. Unlike Defendant's counsel, whose luxurious offices are three blocks from

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[11] Defendant also attacks Mary Ruth Hughes and her travel expenses by claiming that she is the undersigned's wife and is a "self-described corporate transactional attorney." (Motion, p. 10) The fact that Ms. Hughes is married to another attorney on this case is completely irrelevant, and the webpage bio that Defendant points to was crafted in 2011 for the purpose of attracting corporate clients and has not been updated since. (Hughes Decl. ¶ 3). When Ms. Hughes was employed *at Gibson Dunn & Crutcher* (2001-2010) she regularly worked on litigation matters and her travel was separately billed to clients, and since 2012 Ms. Hughes has devoted most of her professional time to voting rights litigation. (*Id.* at ¶ 2).

the courthouse, the nearest office maintained by any of Plaintiffs' counsel is several miles away. (*Id.* at ¶ 24). Having that war room proved indispensable, as it allowed ready access to documents necessary for trial, a place to convene and prepare for the afternoon or next day of trial, and even a location to take two depositions *during trial* because those witnesses (including one of Defendant's council members) had defied court orders requiring that they submit to depositions before trial. (*Id.*). Perhaps Defendant wished for Plaintiffs' counsel to be at a significant disadvantage during trial, but the importance of this case required Plaintiffs' counsel to do what they could to negate their already significant financial disadvantage.

G. Deposition Summaries

Similar to its other gripes, Defendant complains that outsourcing deposition summaries was not "necessary to the conduct of the litigation." (Mot., at p. 12.) But Defendant should be thankful. Had Plaintiffs' attorneys summarized every deposition, or each trial attorney read each transcript of the depositions he did not attend, the corresponding attorneys' fees would be far more than $5,256.00.

Perhaps even more telling of the reasonableness of Plaintiffs' expenditures than an exhaustive analysis of each invoice, receipt, and mile traveled, would be a comparison of Plaintiffs' expenses to the costs incurred by Defendant's counsel. But Defendant fails to provide any significant information about the costs incurred or billed by its counsel in this case, and has generally refused to provide Plaintiff or the local press any information about the billing of its high-priced attorneys. (See Shenkman Decl. ¶ 28, Exs. P, Q). The fee applications submitted by Defendant's counsel in other cases, however, demonstrates that firm separately charges the same sort of expenses that Plaintiffs seek here. (*Id.* at ¶ 29, Ex. R).

Ultimately, the expenses incurred by Plaintiffs in pursuit of this case, upon which the fundamental voting rights of tens of thousands of Santa Monica residents hinged, were all reasonable because they were all necessitated by the (continuing) recalcitrance of Defendant and its counsel. At any point in this case, Defendant could have cut off all expenses by correcting its own election system – just as each and every other political subdivision had done before, most without a lawsuit at all. Having refused, Defendant should not be heard to complain about the expenses it has necessitated.

Respectfully submitted,

DATED: June 12, 2019 By: _____
Kevin I. Shenkman