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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

VIETNAMESE AMERICAN COMMUNITY OF NORTHERN CALIFORNIA, a non-profit corporation,

Plaintiff

vs.

CITY OF SAN JOSE; CITY COUNCIL OF SAN JOSE; REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE; AND DOES 1-20,

Defendant,

Case No.: 1-08-CV-107082

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF REASONABLE ATTORNEYS' FEES

Date: January 5, 2012
Time: 9:00 a.m.
Dept.: 21
Judge: The Honorable Joseph H. Huber

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INTRODUCTION

By this motion, plaintiff Vietnamese American Community of Northern California ("VACNORCAL") requests an award of reasonable attorneys' fees and costs from defendants City of San Jose, City Council of the City of San Jose, and the Redevelopment Agency of the City of San Jose (collectively, "the City"), pursuant to the fee recovery provisions of the Ralph M. Brown Act and California Public Records Act. (Gov. Code §§ 54960.5, 6259(d).)

STATEMENT OF FACTS AND SUMMARY OF LITIGATION

I. THE VIETNAMESE BUSINESS DISTRICT PROJECT

VACNORCAL's Second Amended Complaint ("SAC") alleges as follows:

VACNORCAL is a non-profit, public benefit corporation representing the interests of Northern California's Vietnamese American community. (SAC, ¶ 2.) In early 2007, San Jose City Councilmember Madison Nguyen ("Nguyen") began working on the designation of a Vietnamese American retail business district along a portion of Story Road in San Jose with City staff, the City Redevelopment Agency ("RDA"), and a real estate developer named Lap Tang ("Tang"). (*Id.*, ¶ 6.) Tang was developing the Vietnam Town Plaza shopping center in the same area considered for designation as the Vietnamese business district. (*Id.*, ¶ 6.)

Initially, the RDA accepted an offer by Tang to pay for the maintenance of signs and banners designating this area as the "Vietnam Town Business District." (*Id.*, ¶ 6.) However, on or around May 3, 2007, after consulting the City Attorney, the RDA decided not to proceed, citing concerns that doing so could give the appearance of allowing a private party to use public property to advertise or promote its business. (*Id.*, ¶ 6.) The RDA recommended that Nguyen and Mayor Chuck Reed request that the City Council approve the creation of a Vietnamese business district. (*Id.*, ¶ 6.)

On June 5, 2007, the City Council proposed the creation of the business district and preliminarily approved the name "Vietnamese Business District." (*Id.*, ¶ 7.) The City Council directed the RDA to solicit community input on recognition of the district, to determine the cost

and approvals needed for signage to identify the proposed business district, and to return to the City Council with recommendations for implementation. (*Id.*, ¶ 7.)

Two public meetings were held regarding the business district proposal. (*Id.*, ¶¶ 9-11.) At the first public meeting on August 15, 2007, attended by more than 100 people, the primary issue raised by members of the Vietnamese American community was the proposed name for the district. (*Id.*, ¶ 9.) More than 90 percent of the community members at the meeting expressed support for the name "Little Saigon." (*Id.*, ¶ 9.) Nguyen stated that the fairest method for arriving at a name would be a City-conducted survey of residents and businesses within the proposed business district. (*Id.*, ¶ 9.)

After the August 15, 2007, meeting, the RDA conducted what it described as "a survey to stakeholders within a 1,000-foot radius of the proposed Vietnamese retail destination area," asking what they would want to name the proposed area. (*Id.*, ¶ 10.) Of the 117 responses the RDA received, a substantial plurality favored the name "Little Saigon." (*Id.*, ¶ 10.) The name "Saigon Business District" received the least number of votes. (*Id.*, ¶ 10.)

At the second public meeting on October 10, 2007, attended by more than 200 people, over 90 percent of the members of the Vietnamese American community present requested that the business district be named "Little Saigon." (*Id.*, ¶ 11.) In October and November 2007, media organizations conducted polls showing that the "Little Saigon" name was preferred over other names by substantial majorities. (*Id.*, ¶ 12.)

In August or September, 2007, Nguyen had a private conversation with Councilmember Forrest Williams in which Williams promised to support Nguyen with respect to the pending business district proposal. (*Id.*, ¶ 13.) Williams and Nguyen subsequently admitted to having this conversation, and admitted that Williams pledged to support Nguyen with respect to the proposed business district. (*Id.*, ¶ 13.)

Before November 15, 2007, Nguyen and four other members of the City Council engaged in a series of communications, through which they agreed to vote in favor of the creation of a Vietnamese business district, and to name it the "Saigon Business District." (*Id.*, ¶ 14.) This

agreement was reflected in a November 15, 2007, memorandum to which five City Council members were signatories. (*Id.*, ¶ 14.)

At the November 20, 2007 City Council meeting, the City voted 8-3 to pass Resolution No. 74127, which designated the proposed business district as the "Saigon Business District." (*Id.*, ¶ 17.) Of the approximately 1,000 people attending the meeting, over 200 people testified that they opposed that name and supported the name "Little Saigon." (*Id.*, ¶ 17.)

A. The Ralph M. Brown Act Claim

On January 30, 2008, VACNORCAL, through its counsel at the time, Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin"), submitted a letter to the Mayor and City Council requesting that the City Council rescind Resolution No. 74127. (*Id.*, ¶ 18.) The letter stated that Nguyen and other City Council members had discussed and obtained a concurrence regarding the business district's name outside of a noticed public meeting, in violation of the Ralph M. Brown Act ("Brown Act") (Gov't Code §§ 5490, *et seq.*). (*Id.*, ¶ 18.) On February 13, 2008, the City Attorney reported to the City Rules Committee that he did not find any violation of the Brown Act in the City Council's adoption of Resolution No. 74127, but nevertheless recommended rescinding the resolution. (*Id.*, ¶ 19.)

At its March 4, 2008, meeting, the City Council approved Resolution No. 74271, which rescinded Resolution No. 74127 and its designation of the "Vietnamese Business District," but did not admit to any violation of the Brown Act. (*Id.*, ¶ 20.) At the same meeting, the City Council adopted Resolution No. 74270, which recognized the "widespread support" for the name "Little Saigon," but provided that local members of any future business district must decide what to call their district. (*See id.*, ¶ 20.)

On March 25, 2008, the City Council voted to pass Resolution No. 74308, which amended a Council Policy "to create a streamlined process to permit the prompt installation of temporary Community Signs where the Council has previously made an explicit finding that a particular identifying name has 'widespread support' in a relevant community." (*See id.*, ¶ 21.) In light of its previous finding in Resolution No. 74270 that the name "Little Saigon" had "widespread support" in the local Vietnamese American community, the City Council directed

the City Manager to allow private individuals to fund, construct, and install temporary signage bearing the name "Little Saigon." (*Id.*, ¶ 21.)

B. The California Public Records Act Claim

In connection with the naming dispute, VACNORCAL members made a series of requests for public records from defendants pursuant to the California Public Records Act ("CPRA") (Gov't Code §§ 6250 *et seq.*). (*Id.*, ¶¶ 34-38.) The City produced some records in response to VACNORCAL's two January, 2008, requests. (*Id.*, ¶¶ 35, 36.) However, defendants failed to provide all records responsive to those requests. (*Id.*, ¶ 37.)

On February 13, 2008, VACNORCAL submitted another request for public records to the City of San Jose, and specifically to the City's IT Department, for communications regarding the naming of the Vietnamese business district. (*Id.*, ¶ 38.) VACNORCAL requested that "records existing in electronic storage, back-up, or retrieval systems, either local or centralized, as well as records residing on individual computers should be provided." (*See id.*, ¶ 38.) On February 25, 2008, the City responded to VACNORCAL's request, stating that "IT needs to determine what programming would be necessary to construct a search for the information you have requested and the cost to create the programming." (*See id.*, ¶ 39.) The City concluded that VACNORCAL would be held responsible for the costs of such a search. (*Id.*, ¶ 39.)

On March 10, 2008, the City responded to VACNORCAL's February 13, 2008, public records request, stating that the City had worked with the IT departments for the City and the RDA to determine how to respond to the request because documents were purportedly not "readily accessible" without "considerable data compilation, extraction and programming to identify the records." (*Id.*, ¶ 40.) The City estimated that the cost of its alleged "compilation and programming efforts" would be $3,835.16, and stated that it would not proceed without payment. (*Id.*, ¶ 40.)

On March 12, 2008, VACNORCAL's counsel wrote a letter to the City, objecting to the City's demand for reimbursement of costs. (*See id.*, ¶ 41.) In its response to VACNORCAL on March 12, 2008, the City stated that it was entitled to reimbursement under the cost-shifting provision of the CPRA, Government Code section 6253.9, subdivision (b), and reiterated that it

would not conduct any search without VACNORCAL's agreement to reimburse the City. (*Id.*, ¶ 42.) On March 19, 2008, VACNORCAL submitted a written letter to the City Council and Mayor, requesting that they make the records sought in VACNORCAL's February 13, 2008 request immediately available and to charge only for the direct cost of duplication. (*Id.*, ¶ 43.) Defendants refused. (*Id.*, ¶ 44.)

II. PROCEDURAL HISTORY

As described in further detail below, this case spanned over three (3) years and required extensive factual and legal preparation. (Chadwick Decl., ¶ 3.)

A. VACNORCAL's Complaints and City's Demurrer

On February 28, 2008, VACNORCAL filed its original Complaint against defendants, alleging its first cause of action for violation of the Brown Act. (Chadwick Decl., ¶ 2.) The Complaint alleged in relevant part that the City and City Council violated the Brown Act by conducting deliberations and obtaining a concurrence regarding the naming of the Vietnamese business district outside of a noticed public meeting. (*See id.*, ¶ 2.) The Complaint also alleged other Brown Act violations in connection with the redevelopment of the Tropicana Shopping Center, the renovation of Fire Station No. 2, and the Mayor's budget proposals. (*See id.*, ¶ 2.)

On April 4, 2008, VACNORCAL filed its Verified First Amended Complaint, adding a cause of action for violation of the CPRA. (*Id.*, ¶ 2).) VACNORCAL alleged that the City was erroneously refusing to search for documents pursuant to VACNORCAL's February 13, 2008, CPRA request unless VACNORCAL agreed to reimburse the City for the costs of the search. (*See id.*, ¶ 2.)

On May 20, 2008, the City filed a Demurrer. (*Id.*, ¶ 3).) VACNORCAL opposed the City's demurrer. In a July 24, 2008 Order, the Court overruled the City's Demurrer as to the Brown Act claim against the City and City Council, sustained the Demurrer as to the Brown Act claim against the RDA with leave to amend, and sustained the Demurrer as to the CPRA claim against all defendants with leave to amend. (*Id.*, ¶ 3.)

On August 4, 2008, VACNORCAL filed its Verified Second Amended Complaint, amending its CPRA claim to allege in relevant part that, given defendants' admission that the

documents requested could be provided "using a software search tool designed for such purposes," no data compilation, extraction, or programming would be necessary to identify and produce the requested records. (*See id.*, ¶ 3.)

B. Discovery

During the course of this action, the parties conducted extensive discovery. (*Id.*, ¶4.) VACNORCAL took depositions of eight (8) City witnesses, including Forrest Williams, Madison Nguyen, Nora Campos, Linda Lezotte, Pete Constant, Lap Tang, Vijay Sammeta, and Steve Reuter, and defended the deposition of Tien Nguyen, President of VACNORCAL. (*Id.*, ¶ 4.) VACNORCAL served the City with three sets of requests for production of documents, a set of requests for admissions, two sets of form interrogatories, and one set of special interrogatories. (*Id.*, ¶ 4.) On July 26, 2009, VACNORCAL also responded to the City's form interrogatories, requests for production of documents, and special interrogatories. (*Id.*, ¶ 4.) In addition to reviewing the City's responses to VACNORCAL's CPRA requests, VACNORCAL also had to review several thousand pages of documents produced by the City. (*Id.*, ¶ 4.)

C. VACNORCAL's Motion for Order to Preserve Evidence

During the deposition of Councilmember Williams on March 9, 2009, VACNORCAL learned that he had destroyed records when he left office at the end of 2008. (Chadwick Decl., ¶ 5.) Fearing that the City was not adequately protecting discoverable evidence, VACNORCAL's counsel wrote to the City on March 11, 2009, requesting that the City provide adequate evidence demonstrating that the City had a litigation hold in place. (*Id.*, ¶ 5.) The City responded on March 19, 2009, that it had preserved reasonably discoverable documents pertinent to the case and stated that there was no basis for a preservation order. (*Id.*, ¶ 5.) On April 3, 2009, VACNORCAL's counsel appeared *ex parte* for an evidence preservation order. (*Id.*, ¶ 5.) The Court issued an evidence preservation order on May 13, 2009. (*Id.*, ¶ 5.)

D. Defendants' Motion for Protective Order

The City served VACNORCAL with a notice of motion and motion for a protective order on May 5, 2009, to prevent VACNORCAL or its members from broadly distributing information gained from the depositions of San Jose City Council members. (Chadwick Decl., ¶ 6.)

VACNORCAL opposed the City's motion on May 19, 2009, arguing that the City's motion was unjustified. (*Id.*, ¶ 6.) The Court denied the City's motion for protective order on May 29, 2009, on the basis that defendants failed to establish good cause. (*Id.*, ¶ 6.) The City then filed a petition for writ of mandate, which was denied by the Sixth District Court of Appeal on October 13, 2009. (*Id.*, ¶ 6.)

E. Parties' Motions for Summary Judgment and Writ Proceedings

On December 23, 2009, the parties filed cross-motions for summary judgment on both of plaintiff's causes of action. (Chadwick Decl., ¶ 7.) VACNORCAL pursued its own motion and opposed the City's cross-motion for summary judgment. On February 16, 2010, the Honorable Mark H. Pierce issued an Order granting defendants' motion for summary adjudication of VACNORCAL's first cause of action for violation of the Brown Act. (*Id.*, ¶ 7.) The Court found that the defendants had committed a "one-time past offense" in violation of the Brown Act with respect to the naming of the Vietnamese business district. (*Id.*, ¶ 7.) It found that the City Council cured this violation by rescinding Resolution No. 74127. (*Id.*, ¶ 7.) However, the Court held that VACNORCAL was not entitled to declaratory or injunctive relief because it construed the Brown Act as not applying to past violations, an interpretation which VACNORCAL reserves the right to appeal. (*Id.*, ¶ 7.) As to the CPRA claim, the Court denied both parties' motions for summary adjudication. (*Id.*, ¶ 7.) VACNORCAL petitioned the Sixth District Court of Appeal for a writ of mandate to set aside the lower court's order, which was denied on June 3, 2010. (*Id.*, ¶ 7.)

III. TRIAL AND POST-TRIAL BRIEFING

Sheppard Mullin ceased representing VACNORCAL in this matter in October, 2010. (Chadwick Decl., ¶ 8.) VACNORCAL subsequently retained the firm of McManis Faulkner to take the CPRA claim to trial. (McManis Decl., ¶ 2.) McManis Faulkner agreed to take the case because of the case's public importance, particularly to the citizens of San Jose, where McManis Faulkner is located. (*Id.*, ¶ 2.)

McManis Faulkner spent extensive time preparing the case for trial, including reviewing the file and history of the action; reviewing and organizing evidence gathered through discovery

and the City's documents produced in response to the CPRA requests at issue; interviewing a number of consultants on technical issues involved in searching for electronic data and emails; interviewing and preparing potential witnesses; researching the novel legal issues involved; and preparing all pre-trial filings. (*Id.*, ¶ 3.)

On January 18 and 20, 2011, a bench trial on VACNORCAL's CPRA claim was held before the Honorable Joseph Huber. (*Id.*, ¶ 4.) The trial required substantial research and preparation by McManis Faulkner due to the novelty of VACNORCAL's claim. (*Id.*, ¶ 4.) Government Code section 6253.9(b) has never been subject to interpretation by a Court of Appeal to establish that a public agency cannot shift costs to the public for performing a diligent electronic search. (*Id.*, ¶ 4.) McManis Faulkner was also under considerable time constraints to conduct its trial preparation, owing to the late stage at which it was asked to take over VACNORCAL's case. (*Id.*, ¶ 4.)

The Court heard testimony from seven (7) witnesses, including that of two VACNORCAL members, two City IT employees, the Administrative Officer of the RDA, the City's Public Records Manager, and the former City Clerk. (*Id.*, ¶ 5.) At the close of trial, the Court permitted closing arguments to be submitted in writing. (*Id.*, ¶ 5.)

IV. POST-TRIAL BRIEFING AND JUDGMENT

On February 4, 2011, the City sent a letter to the Court requesting permission to reopen the City's case-in-chief and hold an evidentiary hearing to allow the testimony of two additional City witnesses. (McManis Decl., ¶ 6.) VACNORCAL opposed the request on February 8, 2011, on the basis that the City had ample opportunity to present this testimony during trial and failed to show good cause for a new hearing. (*Id.*, ¶ 6.) In its February 25, 2011, Order, this Court denied the City's request.

The parties submitted their closing arguments on March 11, 2011. (*Id.*, ¶ 7.) Along with its closing argument, the City submitted a Request for Judicial Notice. (*Id.*, ¶ 7.) VACNORCAL filed an opposition to this request on March 18, 2011, arguing that the City was attempting once again to introduce new evidence not presented at trial and that some of the items were not proper subjects of judicial notice. (*Id.*, ¶ 7.)

On May 16, 2011, the Court issued a Tentative Decision, denying the City's Request for Judicial Notice and finding in favor of VACNORCAL. (*Id.*, ¶ 8.) The Tentative Decision ordered the City to conduct the search responsive to VACNORCAL's February 13, 2008, request, without charging a search fee, and also to conduct a search for back-up tapes. (*Id.*, ¶ 8.)

The City submitted its request for a Statement of Decision, as well as a Proposal as to Content of Statement of Decision, on May 31, 2011. (*Id.*, ¶ 9.) VACNORCAL submitted its Proposals Regarding Statement of Decision on June 10, 2011. (*Id.*, ¶ 9.)

On June 15, 2011, the City sent a letter to the Court, challenging the contents of VACNORCAL's Proposals Regarding Statement of Decision. (*Id.*, ¶ 10.) The following day, on June 16, 2011, VACNORCAL submitted a response to the Court, objecting to the City's attempt to reargue its case through its letter to the Court. (*Id.*, ¶ 10.)

The Court issued its Proposed Statement of Decision on July 12, 2011, which was substantially identical to its Tentative Decision. (*Id.*, ¶ 11.) The City filed its objections to the Proposed Statement of Decision on August 1, 2011. (*Id.*, ¶ 11.) That same day, the Court issued its Statement of Decision and Judgment, which again was substantially identical to its Proposed Statement of Decision. (*Id.*, ¶ 11.) On August 3, 2011, the City wrote a letter to the Court, expressing its concern that the Court had not read the City's objections and had prematurely issued its Statement of Decision and Judgment. (*Id.*, ¶ 11.)

Having considered the City's letter, the Court then issued its final Statement of Decision on August 12, 2011. (*Id.*, ¶ 12.) The final Statement of Decision was substantially identical to the previous Statement of Decision. (*Id.*, ¶ 12.) The Court once again stated that the City failed to search for and disclose all public records in response to VACNORCAL's February 13, 2008 CPRA request. (*Id.*, ¶ 12.) The Court ordered the City to perform the requested search, with VACNORCAL only to be charged for the direct cost of duplicating responsive records in electronic format. (*Id.*, ¶ 12.) The Court specifically found that the City's use of existing software such as Discovery Attender to conduct searches did not constitute "data compilation, extraction, or programming" within the meaning of the CPRA. (*Id.*, ¶ 12.) The Court also

ordered the City to perform VACNORCAL's requested searches for emails on back-up tapes, but stated that VACNORCAL should bear the cost of that search. (*Id.*, ¶ 12.)

VACNORCAL submitted a proposed final judgment on September 2, 2011. (*Id.*, ¶ 14.) The City objected to VACNORCAL's proposed judgment, claiming that it was entitled to costs on VACNORCAL's Brown Act Claim. (*Id.*, ¶ 14.) VACNORCAL responded to the City's objection, noting that under Government Code section 54960.5, a Court may only award costs to a defendant where the action was "clearly frivolous and totally lacking in merit." (*Id.*, ¶ 14.) The Court agreed with VACNORCAL and entered final judgment on October 11, 2011. VACNORCAL filed its Memorandum of Costs on October 28, 2011. (*Id.*, ¶ 14.) VACNORCAL now brings its motion for an award of attorney's fees and costs for litigation of both its First Cause of Action for violation of the Ralph M. Brown Act and its Second Cause of Action for violation of the California Public Records Act.

LEGAL ARGUMENT

I. VACNORCAL IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS.

The Brown Act, Gov. Code sections 54950 *et seq.*, and the CPRA, Gov. Code sections 6250 *et seq.*, serve similar purposes, namely government accountability and transparency. While the Brown Act's intent is that "[public agencies'] actions be taken openly and that their deliberations be conducted openly," the CPRA proclaims that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code §§ 54950, 6250.) The public interest has been vindicated by VACNORCAL's successes on its Brown Act and CPRA claims, and VACNORCAL is accordingly entitled to its reasonable attorney's fees and costs.

A. VACNORCAL Is A Prevailing Party.

As explained further below, VACNORCAL is entitled to recover its reasonable attorneys' fees and costs on all of its claims because it is a "prevailing party" within the meaning of both the Brown Act and the CPRA.

1. VACNORCAL Is Entitled To Attorneys' Fees and Costs Under The Brown Act.

This Court should award VACNORCAL its attorneys' fees and costs under the Brown Act given Judge Pierce's finding that the City committed a Brown Act violation. The Brown Act states in relevant part that "[a] court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960 or 54960.1 where it is found that a legislative body of the local agency has violated this chapter. The costs and fees shall be paid by the local agency [ ]." (Gov. Code § 54960.5.)

Attorney fee awards under the Brown Act are discretionary. (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1077.) "[T]here are no express criteria governing the discretionary award of attorney's fees in Brown Act cases." (*Common Cause v. Stirling* ("*Common Cause I*") (1981) 119 Cal.App.3d 658, 662.) Courts have considered, among other factors, "the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit." (*Galbiso*, *supra*, 167 Cal.App.4th at 1077, quoting *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686.) The discretion of the trial court to deny fees to a prevailing plaintiff is narrow, and the court should only deny fees "if the defendant shows that special circumstances exist that would make such an award unjust." (*Id.*, quoting *Los Angeles Times Communications LLC v. Los Angeles County Bd. of Supervisors* ("*LA Times*") (2003) 112 Cal.App.4th 1313, 1327.) Neither the defendant's good faith nor the prevailing plaintiff's ability or inability to pay private counsel are considered "special circumstances" that justify denying a fee award under the Brown Act. (*LA Times*, *supra*, 112 Cal.App.4th at 1333-34.)

Here, Judge Pierce's Order acknowledged that defendants violated the Brown Act in connection with the naming of the Vietnamese business district and adoption of Resolution No. 74127, stating that "the City's failure to cure its violation within 30 days is a 'one-time past offense.'" However, relying on what VACNORCAL contends is an erroneous interpretation of the Brown Act, the Court did not provide declaratory and injunctive relief on the grounds that the

past violations are not "related to present or futures one" or are not "likely to recur." Notwithstanding the Court's failure to provide specific relief, VACNORCAL's exposure of a Brown Act violation generated an important public benefit that warrants an award of fees. In particular, VACNORCAL's lawsuit was necessary because the City denied any violation of the Brown Act in connection with the naming of the Vietnamese business district, even after the City Council rescinded Resolution 74127. (*See LA Times, supra*, 112 Cal.App.4th at 1332 (finding Brown Act litigation was necessary where defendant agency's legal counsel continually asserted that no Brown Act violations occurred, "forcing the matter to trial and judgment").) The Court's failure to find that the City's Brown Act violation is likely to recur does not detract from VACNORCAL's entitlement to fees. (*See id.* at 1333, fn. 9 (finding that "[e]ven if recurring [Brown Act] violations were unlikely, the judicial determinations obtained by appellants conferred a sufficient public benefit to compel an award of fees"; *Common Cause v. Stirling* ("*Common Cause II*") (1983) 147 Cal.App.3d 518, 524 (finding that even if the trial court were correct that a repeat violation was unlikely, "this does not support the conclusion that the public benefit from [plaintiff's] action was not sufficient to support an award of attorney fees.").)

Denying VACNORCAL its attorneys' fees and costs would be contrary to the legislative purpose behind the Brown Act. The Brown Act "provides specific legislative authorization for attorney's fees in actions brought to enforce a public policy in a context where actual recoverable damages are likely to be trivial. The damage is to the public integrity, and the fees are designed to make it economically feasible to rectify that damage by private legal means." (*Common Cause I, supra,* 119 Cal.App.3d at 664.) Here, the public integrity was injured when the City deliberated and concurred with respect to action to be taken regarding the Vietnamese business district proposal, before the November 20, 2007, meeting and outside of any public meeting. This injury was partially redressed, and the Brown Act's policy favoring open meetings was vindicated, by the Court's acknowledgment that the Brown Act was violated. VACNORCAL thus succeeded on a significant issue in this litigation. (*See Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153, quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433 ("It is settled that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if

they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit'" (emphasis in original).) Accordingly, this Court should grant VACNORCAL its reasonable attorneys' fees and costs in pursuing the Brown Act claim.

2. VACNORCAL is Entitled To Attorneys' Fees and Costs Under the CPRA.

VACNORCAL is additionally entitled to an award of fees under the CPRA, which provides that "[t]he court **shall award** court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The cost and fees shall be paid by the public agency." (Gov. Code § 6259(d) (emphasis added).) The award of costs and attorneys' fees to a prevailing petitioner under the CPRA is considered mandatory. (*Filarksy v. Sup. Court* (2002) 28 Cal.4th 419, 427; *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 899-900.) The mandatory attorneys' fees award to a prevailing plaintiff serves to provide "protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure." (*Galbiso*, *supra*, 167 Cal.App.4th at 1088, quoting *Filarsky*, *supra*, 28 Cal.4th at 427.)

A plaintiff in a CPRA action is considered the prevailing party "if his [or her] lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior [citation], or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result." (*Belth*, *supra*, 232 Cal.App.3d at 901-902.) Here, VACNORCAL prevailed on its CPRA claims as the Court made a specific finding that the City failed to fulfill its statutory obligation to search for and disclose public records, and erroneously invoked the cost-shifting provision of the CPRA. The Court ordered the City to conduct the search it previously refused to do pursuant to VACNORCAL's February 13, 2008 request, and prohibited the City from erroneously charging VACNORCAL for any cost other than the direct cost of duplicating those records. The Court also ordered the City to conduct a search of its back-up tapes, which the City previously declined to do.

The City contended at trial that VACNORCAL would not be entitled to attorneys' fees unless and until the City searched for and actually found records that it had not previously provided to VACNORCAL. (Trial tr. vol. 2, 80.) However, VACNORCAL is currently entitled to fees as subsequent disclosure of previously withheld documents is not the exclusive basis on which fees may be awarded under the CPRA.[1] In *Galbiso*, *supra*, the court stated that while the "standard test" is whether the litigation resulted in subsequent disclosure, "[w]e do not believe the cases go so far as to say there could never be another basis for finding a plaintiff to be a prevailing party." (167 Cal.App.4th at 1088-89; *id.* at 1088, fn. 14.) There, the court looked to the specific facts of the case and relied upon a "denial of access theory" in determining that the plaintiff was entitled to fees. (*Id.* at 1087-89.) The court found it sufficient that the trial court had granted the plaintiff's request for an injunction to inspect and copy records at the public agency that had previously forced the plaintiff to leave the premises. (*Id.* at 1089.) The plaintiff was not required to demonstrate that a specific, previously withheld document was subsequently disclosed due to her lawsuit. (*Id.* at 1088-89.) Rather, "[the plaintiff's] success in the lawsuit was adequately demonstrated by her vindication of her basic right of access under the [CPRA]." (*Id.* at 1089.)

Similar to the plaintiff in *Galbiso*, VACNORCAL was presented with "highly unique circumstances" under which it was prevented from accessing public records. (*See Galbiso*, 167 Cal.App.4th at 1089.) Here, the City steadfastly refused to search for any documents in VACNORCAL's February 13, 2008, CPRA request unless VACNORCAL agreed to reimburse the City nearly $4,000. That price did not include a search for deleted emails on back-up tapes, which the City asserted it had no obligation to conduct. VACNORCAL's success vindicates the public's basic right of access by requiring the City to conduct these searches. (*See Galbiso*, *supra*, 167 Cal.App.4th at 1089). Without VACNORCAL's suit, the City could have continued to rely upon its previous refusal to conduct the requested searches. (*See Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1394, quoting *Belth*, *supra*, 232 Cal.App.3d at 901-902

[1] The City has not yet conducted any searches pursuant to the Court's Statement of Decision. One may not rule out therefore the possibility that previously withheld documents will be disclosed once the City conducts these searches.

("A plaintiff is considered the prevailing party if his [or her] lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior [citation], or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result"); *Belth, supra*, 232 Cal.App.3d at 902 (finding it appropriate to consider "(a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." (Citations omitted).) Having prevailed in this action and furthered the CPRA's objective of increasing freedom of information, VACNORCAL is entitled to recover its attorneys' fees and costs. (*See id.* at 903.)

II. THE REQUESTED FEES WERE REASONABLY INCURRED BY VACNORCAL'S COUNSEL.

California has applied the "lodestar" method in awarding statutory attorneys' fees, which starts by multiplying the number of all hours reasonably expended on the litigation by the reasonable hourly rate for each attorney. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Serrano v. Unruh* ("*Serrano IV*") (1982) 32 Cal.3d 621, 643.) This method has been applied in awarding fees and costs to prevailing plaintiffs in Brown Act and CPRA actions. (*See, e.g., International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal Inc.* (1999) 69 Cal.App.4th 287, 302 (Brown Act action); *Bernardi, supra*, 167 Cal.App.4th at 1393 (CPRA action).) After calculating the lodestar, the court may adjust it "based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.]" (*Ketchum, supra*, 24 Cal.4th at 1132.) VACNORCAL's lodestar figure of $716,927.51 is calculated in the chart attached to the Declaration of James McManis as Exhibit D ("Exhibit D Chart").

A. VACNORCAL's Lodestar is Reasonable.

VACNORCAL is entitled to be compensated for "all hours reasonably spent on the matter" by its attorneys, computed on the "reasonable market value" of their services. (*Serrano IV, supra*, 32 Cal.3d at 643.) VACNORCAL's fee claim is based on detailed time records kept concurrently throughout the course of this litigation. (Chadwick Decl., ¶ 9; McManis Decl., ¶

15, Exh C.) The Exhibit D Chart has been prepared based on fees properly billed to VACNORCAL by Sheppard Mullin, and on fees that would have been billed by McManis Faulkner had it worked on an hourly, non-contingent basis. (Chadwick Decl., ¶ 9; McManis Decl., ¶¶ 18 & 19.) The Chart provides reasonably detailed descriptions of the hours worked. (Chadwick Decl., ¶ 9; McManis Decl., ¶¶ 18 & 19.) The verified time statements of counsel "are entitled to credence in the absence of a clear indication the records are erroneous." (*Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 396.)

1. The Hours Claimed Were Reasonably Expended.

VACNORCAL's counsel should be fully compensated for all services reasonably provided. (*Ketchum, supra*, 24 Cal.4th at 1133.) James Chadwick of Sheppard Mullin was the principal attorney responsible for the initial development of this case and performed the majority of the work preceding trial on the CPRA claim. (Chadwick Decl., ¶ 9.) The other Sheppard Mullin attorneys and paralegals assisted Mr. Chadwick with the litigation. (*Id.*, ¶ 14.) The hours claimed by Sheppard Mullin's legal professionals were reasonably spent investigating facts, researching the law, seeking discovery from defendants, including taking eight (8) depositions, drafting pleadings, filing and opposing a demurrer and various motions, including cross-motions for summary judgment, and filing a writ petition with the Court of Appeals. (*Id.*, ¶ 15.) All of these tasks were necessary and useful to VACNORCAL's successes on the Brown Act and CPRA claims. (*Id.*, ¶ 15.)

James McManis of McManis Faulkner was the lead lawyer responsible for supervision of trial preparations and was lead counsel for VACNORCAL at trial. (McManis Decl., ¶ 33.) Marwa Elzankaly was also responsible for trial preparation and second chaired the trial and put on VACNORCAL's case in chief. Jennifer Murakami was primarily responsible for legal research and drafting of pleadings. (*Id.*, ¶ 33.) The hours claimed by McManis Faulkner were reasonably spent trying this action and preparing the case for trial, including reviewing the file and history of the action; reviewing and organizing evidence gathered through discovery and the City's documents produced in response to the CPRA requests at issue; interviewing a number of

consultants on technical issues involved in searching for electronic data and emails; interviewing and preparing potential witnesses; researching the novel legal issues involved; preparing all pre-trial and post trial filings; and undergoing the Court's statement of decision process and final judgment.

These tasks were reasonably expended and critical to VACNORCAL's success on its CPRA claim. (*Id.*, ¶ 34.) The novelty of the CPRA claim made trial preparation demanding as no published appellate court decisions have construed the cost-shifting provision of the CPRA. (*Id.*, ¶ 34.) Understanding the technical aspects of the City's position regarding the CPRA claim was also demanding and required counsel's careful review of deposition transcripts of the City's witnesses. (*Id.*, ¶ 34.) Moreover, in order to represent VACNORCAL properly, counsel at McManis Faulkner had to familiarize themselves with the full history of this prolonged litigation, relevant case law, and statutory authorities. (*Id.*, ¶ 34.)

Defendants were aggressively represented by the San Jose City Attorney's Office every step of the way. Defendants steadfastly denied any liability on both the Brown Act and CPRA claims, resisted an evidence preservation order that was subsequently granted, and requested a protective order that was subsequently denied. Even after trial, the City engaged in significant post-trial briefing and made requests that were ultimately denied or disregarded by this Court. Defendants proved to be tenacious adversaries in this litigation, which demanded the utmost efforts and expertise of VACNORCAL's counsel.

2. The Hourly Rates Claimed Are Reasonable And Supported By Sufficient Evidence.

The reasonable market value of counsel's services is the standard which the Court should apply in determining the lodestar figure. (*Ketchum*, *supra*, 24 Cal.4th at 1132; *Serrano IV*, *supra*, 32 Cal.3d at 643.) The market rate is established by reference to the "hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type." (*Ketchum*, *supra*, 24 Cal.4th at 1133 (emphasis in original); *Serrano IV*, *supra*, 32 Cal.3d at 643.) The market-rate standard applies regardless of whether counsel charged below the market rate or worked on a contingency basis. (*See International Longshoremen's &*

Warehousemen's Union, supra, 69 Cal.App.4th at 302-303 (finding that trial court did not err in basing award on market-rate fees even though they were in excess of those actually charged by counsel); *Serrano IV, supra*, 32 Cal.3d at 642-643 (finding that public interest firms, which are generally paid at lower than prevailing rates, are entitled to market-rate fees charged by private attorneys); *Lolley v. Campbell* (2002) 28 Cal.4th 367, 374-375 (finding that the market-rate standard applies to attorneys charging a contingent fee).)

The hourly rates charged by Sheppard Mullin and McManis Faulkner are reasonable for Bay Area private practice. Submitted with this motion are the declarations of John L. Cooper and Robert A. Goodin, who are Bay Area attorneys with skills and experience comparable to that of Mr. Chadwick and Mr. McManis. (*See Ketchum, supra*, 24 Cal.4th at 1140 (evidence of reasonableness of fee supported by declarations of local attorneys).) The current "market rates" of these skilled local attorneys who are partners at their respective firms and each of whom has decades of experience, range from $650 per hour to $895per hour. Mr. Goodin's hourly rate is $650 per hour. (Declaration of Robert A. Goodin, Esq. in Support of Plaintiff's Motion for Attorneys' Fees and Costs (Goodin Decl.), ¶ 6.) Mr. Cooper's hourly rate is $895 per hour. (Declaration of John L. Cooper in Support of Plaintiff's Motion for Attorneys' Fees and Costs (Cooper Decl.), ¶ 6.) The rates for other partners at these attorneys' firms range from $505 to $950 per hour. Senior associates at these firms have hourly rates ranging from $295 to $530 per hour. These firms also bill separately for paralegal time at rates that range from $145 to $300 per hour. (*See* Goodin Decl., ¶ 6; and Cooper Decl., ¶ 6.)

The hourly rates charged by Mr. Chadwick and Mr. McManis are reasonable for attorneys of their experience, reputation, and skill. (*See* Chadwick Decl., ¶¶ 11-13; McManis Decl., ¶ 17; Goodin Decl. ¶¶ 4-5 and 8-9; and Cooper Decl., ¶¶ 4-5 and 8-9.) Mr. Chadwick is a partner at Sheppard Mullin's Palo Alto office and has practiced law for twenty years. (Chadwick Decl., ¶¶ 1 & 14, Exh C.) The hourly billing rates charged by Sheppard Mullin in 2011 ranged from $120 to $285 for paralegals, and $310 to $670 for attorneys. (*Id.*, ¶ 11.) These rates are comparable to or lower than the rates charged by many attorneys of similar skill and experience in the Bay Area and are reasonable. (*Id.*, ¶ 11.)

Mr. McManis has practiced in Santa Clara County for over four decades. (McManis Decl., ¶ 23.) His hourly rates are fully supported by his skill and experience as a trial attorney. (*Id.* ¶¶ 23-26.) His hourly rate of $750 comports with the hourly rates charged for trial lawyers of his caliber. (*Id.* ¶ 17.) Similarly, Ms. Elzankaly's rates are reasonable for an attorney with her level of trial experience. Ms. Elzankaly's hourly rate of $500 reflects her experience as an attorney in her twelfth year of practice and a partner at McManis Faulkner. (*Id.*, ¶¶ 28-29.) Ms. Murakami's current hourly rate of $250 reflects her experience as an attorney in her first year of practice. (*Id.*, ¶ 30.) These rates are reasonable, meriting a full award.[2]

B. VACNORCAL's Out-of-Pocket Expenses Are Reasonable.

In addition to hourly fees, out-of-pocket costs that are normally billed to a client may be recoverable as part of the request for fees, even if they are not recoverable as ordinary costs under Code of Civil Procedure section 1033.5, subdivision (b). (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1419, overruled as to expert witness fees in *Olson v. Automobile Club of S. Cal.* (2008) 42 Cal.4th 1142, 1151; *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1165-1166; *Downey Cares v. Downey Community Dev. Comm'n* (1987) 196 Cal.App.3d 983.) Out-of-pocket costs that are considered discretionary under Code of Civil Procedure section 1033.5, subdivision (c)(4), have also been allowed as part of an attorney's fees award. (*See, e.g., Amaral v. Cintas Corp., No. 2* (2008) 163 Cal.App.4th 1157, 1218, fn. 27 (transcript and translation expenses recoverable); *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1099 (computerized legal research expenses recoverable).)

VACNORCAL incurred out-of-pocket costs for courier services, computerized legal research, photocopying, scanning, and legislative history services, all of which were reasonably necessary to the conduct of the litigation. (Chadwick Decl., ¶ 11; McManis Decl., ¶ 16.) All such costs associated with the trial were advanced, despite the fact that there were ongoing

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[2] The court may base the award on current attorney rates to compensate for the length of time the successful party's attorney has had to wait to receive fees. *Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274, 283-84 (1989).

obligations of rent, supplies, salaries and other overhead costs, with no revenue from this case to offset these expenses. (McManis Decl., ¶ 19.) All costs requested are charged to clients as part of Sheppard Mullin and McManis Faulkner's regular billing practice. (Chadwick Decl., ¶ 9; McManis Decl., ¶ 19.) Since such costs are charged to hourly fee-paying clients, they should therefore be awarded as attorneys' fees to VACNORCAL.

The out-of-pocket nontaxable expenses incurred by VACNORCAL total $24,455.51. (McManis Decl., ¶ 16, Exh D.) VACNORCAL also incurred taxable costs in the amount of $21,051 and previously submitted its Memorandum of Costs on October 28, 2011. (*Ibid.*)

CONCLUSION

VACNORCAL's action vindicated important rights for the public. In addition to exposing a Brown Act violation, VACNORCAL's action confirms that a public agency cannot shift costs to the public for performing a diligent electronic search for emails to, from, and between public officers, in response to a commonplace CPRA request. The fees and costs requested by VACNORCAL are reasonable under the applicable standards, and fully supported by the evidence. Based on the foregoing, it is respectfully requested that the Court award attorneys' fees and costs in the amount requested: $716,927.51.

DATED: November 18, 2011

McMANIS FAULKNER

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