

1 JAMES McMANIS (40958)
2 MARWA ELZANKALY (206658)
3 JENNIFER H. MURAKAMI (273603)
4 McMANIS FAULKNER
5 a Professional Corporation
6 50 West San Fernando Street, 10th Floor
7 San Jose, California 95113
8 Telephone: (408) 279-8700
9 Facsimile: (408) 279-3244
10 Email: melzankaly@mcmanislaw.com
11 jmurakami@mcmanislaw.com

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Clara J. Pacheco
County Clerk
Santa Clara Superior Court
San Jose, California
By CLARA J. PACHECO
Clerk

7 Attorneys for Plaintiff, VIETNAMESE AMERICAN
8 COMMUNITY OF NORTHERN CALIFORNIA

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SANTA CLARA**

12
13 VIETNAMESE AMERICAN COMMUNITY
14 OF NORTHERN CALIFORNIA, a non-profit
15 corporation,
16
17 Plaintiff,
18
19 vs.
20
21 CITY OF SAN JOSE; CITY COUNCIL OF
22 SAN JOSE; REDEVELOPMENT AGENCY
23 OF THE CITY OF SAN JOSE; AND DOES 1-
24 20,
25
26 Defendants,

Case No.: 1-08-CV-107082

**PLAINTIFF'S SUPPLEMENTAL BRIEF
FOLLOWING HEARING ON
PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES AND COSTS, AND
CITY'S MOTION TO STRIKE OR TAX
COSTS; AND PLAINTIFF'S REQUEST
FOR LEAVE TO AMEND JUDGMENT**

1 INTRODUCTION

2 Pursuant to the Court’s request, plaintiff Vietnamese American Community of Northern
3 California (“VACNORCAL”), submits this brief following the February 10, 2012 hearing on
4 VACNORCAL’s motion for attorneys’ fees and costs, and defendants City of San Jose, City
5 Council of San Jose, and Redevelopment Agency of the City of San Jose’s (collectively, “the
6 City”) motion to strike or tax costs. As explained below, the Court has the authority to amend its
7 final judgment (“Judgment”) to clarify VACNORCAL’s right to move for attorneys’ fees under
8 the Ralph M. Brown Act (“Brown Act”), Government Code sections 54960 *et seq.*, and
9 VACNORCAL respectfully requests that the Court do so pursuant to the proposed amended
10 judgment submitted herewith. Moreover, notwithstanding the Judgment’s silence on the issue,
11 VACNORCAL may be awarded attorneys’ fees under the Brown Act because the Judgment does
12 not affirmatively preclude such fees, and VACNORCAL submitted a timely memorandum of
13 costs as well as a timely motion for fees.

14 STATEMENT OF RELEVANT FACTS

15 On September 2, 2011, VACNORCAL submitted a proposed judgment to the Court
16 setting forth Judge Pierce’s ruling on VACNORCAL’s Brown Act claim, and Judge Huber’s
17 ruling on VACNORCAL’s claim under the California Public Records Act (“CPRA”),
18 Government Code sections 6250 *et seq.* See Declaration of James McManis (“McManis Decl.”),
19 ¶ 1, Exh. A. The proposed judgment provided that VACNORCAL shall recover from defendants
20 all costs associated with the CPRA claim. See *id.* VACNORCAL did not include any provision
21 for costs under the Brown Act as it had not yet determined its entitlement to such costs. *Id.*, ¶ 3.
22 The City objected to VACNORCAL’s proposed judgment on the sole ground that the judgment
23 did not include any award of costs to the City for the Brown Act claim. See McManis Decl., ¶ 4,
24 Exh. B. The City offered its own proposed judgment, which added a provision entitling it to
25 costs associated with the Brown Act claim. See *id.* VACNORCAL responded that the City was
26 not the prevailing party under the Brown Act because the Court found a Brown Act violation,
27 and that the City could not recover fees without a finding that VACNORCAL’s action was
28 “clearly frivolous and totally lacking in merit.” See McManis Decl., ¶ 5, Exh. C. The Court’s

1 final Judgment of October 11, 2011 adopted VACNORCAL's original proposed judgment, only
2 adding that VACNORCAL's recovery of costs under the CPRA should be "reasonable." *See*
3 *McManis Decl.*, ¶ 6, Exh. D.

4 VACNORCAL timely filed its Memorandum of Costs, using Judicial Council Form MC-
5 010, on October 28, 2011. *See McManis Decl.*, ¶ 7, Exh. E. Because a judicial determination
6 would be required to fix the exact amount of VACNORCAL's attorneys' fees, VACNORCAL
7 did not enter a figure for attorneys' fees on the Memorandum of Costs, but did state, "[n]oticed
8 motion to follow." *See id.* After the Court issued the final Judgment, VACNORCAL
9 determined its entitlement to attorneys' fees and costs under both the Brown Act and the CPRA,
10 and requested such fees in its timely November 18, 2011 attorneys' fees motion. *Id.*, ¶ 8.

11 LEGAL ARGUMENT

12 **I. THE COURT HAS THE AUTHORITY TO AMEND THE JUDGMENT.**

13 As a threshold matter, the Court has the authority to amend the Judgment in order to
14 clarify VACNORCAL's right to move for attorneys' fees under the Brown Act. Under Code of
15 Civil Procedure section 473, subdivision (d), "[t]he court may, upon motion of the injured party,
16 or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform
17 to the judgment or order directed, and may, on motion of either party after notice to the other
18 party, set aside any void judgment or order." When it prepared the proposed judgment,
19 VACNORCAL was not aware of its entitlement to attorneys' fees under the Brown Act, and
20 inadvertently failed to provide that VACNORCAL could at least apply for such fees. *See*
21 *McManis Decl.*, ¶ 3. However, VACNORCAL's inadvertent failure to insert such a provision in
22 the proposed judgment, later adopted by the Court, is a correctable clerical error. *See Aspen Int'l*
23 *Capital Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1204, quoting *Estate of Doane* (1964) 62
24 Cal.2d 68, 71 (distinguishing clerical errors from judicial errors, the latter of which are "the
25 deliberate result of judicial reasoning and determination"). "If an error, mistake, or omission is
26 the result of inadvertence, but for which a different judgment would have been rendered, the
27 error is clerical and the judgment may be corrected to correspond with what it would have been
28

1 but for the inadvertence. [Citations.] The court has inherent power to correct such errors.” *Id.* at
2 1204, quoting *Pettigrew v. Grand Rent-A-Car* (1984) 154 Cal.App.3d 204, 210. Moreover, such
3 clerical errors may be corrected even where they are based on an attorney draftsman’s proposed
4 judgment. *See Russell v. Superior Court* (1967) 252 Cal.App.2d 1, 8. VACNORCAL’s
5 proposed amended judgment, correcting VACNORCAL’s prior inadvertent omission, does not
6 contradict any preexisting portions of the Judgment or “materially alter the rights of the parties.”
7 *See Aspen Int’l Capital Corp., supra*, 235 Cal.App.3d at 1204, quoting *Craven v. Crout* (1985)
8 163 Cal.App.3d 779, 782. It simply clarifies that VACNORCAL may apply for fees under the
9 Brown Act, without adjudicating that issue. Thus, to the extent that the Court finds it necessary
10 to amend the Judgment to clarify the scope of the post-hearing proceedings, it should do so
11 according to VACNORCAL’s proposed amended judgment.

12 **II. BY FILING A TIMELY MEMORANDUM OF COSTS AND TIMELY MOTION**
13 **FOR ATTORNEYS’ FEES, VACNORCAL PRESERVED ITS CLAIM FOR**
14 **ATTORNEYS’ FEES UNDER THE BROWN ACT.**

15 Notwithstanding the Judgment’s silence on Brown Act fees, VACNORCAL’s request for
16 attorneys’ fees under the Brown Act and CPRA is still properly before the Court. If a judgment
17 contains no provision for costs, the prevailing party preserves its right to claim attorneys’ fees
18 and costs by submitting a timely memorandum of costs and timely motion for attorneys’ fees.
19 *See Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 928,
20 quoting *Williams v. Santa Maria Joint Union High School Dist.* (1967) 252 Cal.App.2d 1010,
21 1014 (noting that “the ‘solution to the sticky problem of what a prevailing party who is entitled
22 to costs...should do if the judgment contains no provision for costs” is that “*he [or she] files a*
23 *cost bill.*”) (emphasis in original)). The court may also amend the judgment to properly reflect
24 the prevailing party’s entitlement to attorneys’ fees and costs. *See Hydratec, supra*, 223
25 Cal.App.3d at 928.

26 In *Hydratec, supra*, the plaintiff sued several defendants and judgment was ultimately
27 entered in plaintiff’s favor except as to one defendant, Associated Farm Management (“AFM”).
28 223 Cal.App.3d at 926-927. The plaintiff prepared proposed judgments providing that all of the

1 parties bear their own costs and attorneys' fees. *Id.* at 927. AFM did not object, despite the fact
2 that it was a prevailing party within the meaning of Code of Civil Procedure section 1032. *See*
3 *id.* at 927; Code Civ. Proc § 1032(a)(4). AFM later appealed the judgment on the basis that the
4 trial court erred by failing to award it costs and attorneys' fees. *Id.* at 926-927. The court held
5 that while the trial court could have amended the judgment to award AFM its costs, AFM
6 ultimately waived its right to costs and fees by failing to file either a memorandum of costs or
7 motion for attorneys' fees. *Id.* at 928-929. As to the trial court's power to amend the judgment,
8 the *Hydratec* court explained that "[t]he court's duty to award costs to the party entitled to them
9 under Code of Civil Procedure section 1032 is ministerial. [Citation.] The statutory right to
10 costs is not lost by virtue of the court's neglect or error. Such neglect or error may be corrected
11 by the trial court. [Citation.]" *Id.* at 928. However, "the fact an incorrect cost allocation may be
12 rectified does not mean the aggrieved party may wait and raise the issue for the first time on
13 appeal. To the contrary if the claimant fails to present a cost bill, a waiver of the right to costs
14 results." *Id.* at 928-929. The court held that the same rule applies to a request for attorneys'
15 fees. *See id.* at 929. The court therefore found that AFM should have moved for its contractual
16 attorneys' fees within the time limits prescribed by the California Rules of Court. *See id.*; Code
17 Civ. Proc. § 1033.5(c)(5) (permitting contractual attorney's fees under Civil Code section 1717
18 to be claimed as costs under Code of Civil Procedure section 1033.5, subd. (a)(10)(A).) The
19 court rejected AFM's argument that the filing of a cost bill or motion for fees would have been a
20 "useless act" since the judgment did not award it costs or fees. *Id.* at 929. Instead, AFM should
21 still have proceeded to submit a cost bill or motion for fees if it planned to claim them. *See ibid.*

22 Like the plaintiff in *Hydratec*, VACNORCAL prepared a proposed judgment that failed
23 to include a provision for certain attorneys' fees and costs. *See Hydratec*, 223 Cal.App.3d at
24 927. However, VACNORCAL filed a timely memorandum of costs explicitly noting that
25 VACNORCAL would make a separate motion for attorneys' fees, and also filed a timely motion
26 for attorneys' fees under both the Brown Act and CPRA. Unlike the defendant in *Hydratec*,
27 VACNORCAL thereby preserved its rights to claim attorneys' fees and costs under both statutes.
28 *See id.* at 929. The Court should also note that VACNORCAL's motion for attorneys' fees

1 under the Brown Act and CPRA does not contradict anything in the Judgment, which is simply
2 silent as to Brown Act fees. In *Hydratec*, the trial court would have had the authority to hear the
3 defendant's cost bill or motion for fees, even though the judgment in that case explicitly
4 provided that the parties would bear their own costs and attorneys' fees. See *id.* at 927, 929.

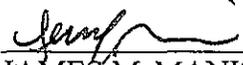
5 Finally, the Judgment's omission of VACNORCAL's entitlement to claim attorneys' fees
6 under the Brown Act has not prejudiced the City since the City has had ample opportunity to
7 oppose VACNORCAL's memorandum of costs and motion for attorneys' fees. In *Guevara v.*
8 *Brand* (1992) 8 Cal.App.4th 995, 997-998, the court applied the principles in *Hydratec* to the
9 arbitration context, and affirmed the trial court's award of costs to the plaintiff who filed a
10 memorandum of costs even though the arbitration award did not award costs. *Id.* at 998. The
11 court noted that "[a] cost bill does not affect the arbitrator's determination of the merits, which is
12 the basis of the award... Permitting the cost bill to be filed after entry of judgment in no way
13 compromises the losing party's opportunity to challenge either the merits of the award or the
14 subsequent award of costs: as to the merits, he can request a trial de novo within 30 days; he can
15 challenge costs (as was done here) by a motion to strike or tax costs." *Id.* at 998. Similarly,
16 here, VACNORCAL's motion for fees under the Brown Act does not seek to compromise the
17 underlying merits of the Brown Act claim, and the City has had the opportunity to oppose
18 VACNORCAL's motion for attorneys' fees and costs.

19 **CONCLUSION**

20 For the foregoing reasons, VACNORCAL respectfully requests that the Court adopt the
21 proposed amended judgment and award VACNORCAL its attorneys' fees and costs as the
22 prevailing party under the Brown Act and CPRA.

23 DATED: February 27, 2012

McMANIS FAULKNER

24 
25 _____
26 JAMES McMANIS
27 MARWA ELZANKALY
28 JENNIFER MURAKAMI
Attorneys for Plaintiff, VIETNAMESE
AMERICAN COMMUNITY OF
NORTHERN CALIFORNIA

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF SANTA CLARA**

3 I am employed in the County of Santa Clara, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 50 West San Fernando Street, 10th
5 Floor, San Jose, California 95113. My email address is: azandate@mcmanislaw.com.

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A. PACHECO
Deputy Clerk
Santa Clara County Superior Court

6 On February 27, 2012, I served the foregoing document described as:

7 **PLAINTIFF'S SUPPLEMENTAL BRIEF FOLLOWING HEARING ON**
8 **PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS, AND CITY'S**
9 **MOTION TO STRIKE OR TAX COSTS**

10 on the parties in this action by placing a true copy(ies) or the original(s) thereof
11 enclosed in a sealed envelope(s) addressed as follows:

12 *(Attorney for Def. City of San Jose)*

13 Richard North
14 Office of the City Attorney
15 City of San Jose
16 200 E. Santa Clara Street, 16th Floor
17 San Jose, CA 95113
18 Tel: 408-535-1900
19 Fax: 408-998-3131
20 Email: rob.fabela@sanjoseca.gov

21 **(BY MAIL)**

22 I enclosed the documents in a sealed envelope or package addressed to the persons at
23 the addresses listed above or on the attached service list. I placed the envelope for
24 collection and mailing, following our ordinary business practices. I am readily
25 familiar with this businesses' practice for collecting and processing correspondence for
26 mailing. On the same day that correspondence is placed for collection and mailing, it
27 is deposited in the ordinary course of business with the United States Postal Service, in
28 a sealed envelope with postage fully prepaid. I am employed in the county where the
mailing occurred. The envelope or package was placed in the mail at San Jose,
California.

(BY FACSIMILE)

Based on an agreement of the parties to accept service by fax transmission, I faxed the
documents to the persons at the fax numbers shown above or on the attached service
list. No error was reported by the fax machine that I used. A copy of the record of the
fax transmission is attached hereto.

(ELECTRONIC MAIL)

Based on a court order or an agreement of the parties to accept service by email or
electronic transmission, I caused the documents to be sent to the persons at the e-mail
addresses listed above or on the attached service list at [Click & Type] a.m./p.m.

(BY PERSONAL SERVICE)

I served the documents by leaving them in an envelope or package clearly labeled to

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the person(s) at the address or above or on the attached service list, with a receptionist or with a person having charge thereof.

(BY OVERNIGHT DELIVERY)

I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above or on the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

(STATE)

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

Executed on February 27, 2012, at San Jose, California.


AMIE ZANDATE