THOMPSON & COLEGATE LLP
3610 Fourteenth Street
P. O. Box 1299
Riverside, California 92502
Tel: (951) 682-5550
Fax: (951) 781-4012

JOHN A. BOYD (SBN 089394)
jboyd@tclaw.net
MICHAEL J. MARLATT (SBN 115957)
mmarlatt@tclaw.net
DIANE MAR WIESMANN (SBN 124409)
dwiesmann@tclaw.net
GARY T. MONTGOMERY (SBN 166817)
gmontgomery@tclaw.net
CRAIG M. MARSHALL (SBN 204182)
cmarshall@tclaw.net
SUSAN KNOCK BECK (SBN 230948)
sbeck@tclaw.net

Attorneys for Petitioners/Plaintiffs, WILLIAM R. ("RUSTY") BAILEY III, MARCIA McQUERN, and THOMAS MULLEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE, CENTRAL DISTRICT

WILLIAM R. ("RUSTY") BAILEY, III, MARCIA McQUERN, and THOMAS MULLEN,

Petitioners/Plaintiffs,

v.

CITY OF RIVERSIDE,

Respondent/Defendant.

CASE NO. RIC 1804755

Hon. Judge Randall S. Stamen
Department 7 – L&M purposes only

REPLY TRIAL BRIEF BY PETITIONERS/PLAINTIFFS ON THE BIFURCATED ISSUES OF THE MAYOR'S VETO AUTHORITY, INCLUDING HIS EXERCISE OF THAT AUTHORITY, THE EFFECT OF THE EXERCISE OF HIS AUTHORITY, AND RELATED ISSUES

[Filed Concurrently with Supplemental Index of Exhibits]

DATE: November 22, 2019
TIME: 8:30 a.m.
DEPT: 7

TRIAL DATE: November 22, 2019
ACTION FILED: March 9, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEAL CASES

CALIFORNIA SUPREME COURT CASES

CALIFORNIA COURT OF APPEAL CASES

CALIFORNIA STATUTES

COME NOW PETITIONERS/PLAINTIFFS WILLIAM R. ("RUSTY") BAILEY III, MARCIA McQUERN, AND THOMAS MULLEN (collectively hereinafter "Plaintiffs") and submit the following Reply Trial Brief concerning the bifurcated veto issues:

The underlying theme of this action is that "formal action taken by vote of the City Council," properly vetoed in accordance with Section 413 of the Charter, is no action at all. The court must not be confused by the City's thousands of pages of documents and its arguments as to why the court should never get to this question. It does not matter what the *action* concerns. If the *action* is properly vetoed, as here pursuant to Section 413 of the Charter of the City of Riverside, it is no *action* at all. It never happened.

Plaintiffs assert "formal *action* by vote of the City Council" – as that language appears in Section 413 of the Charter – *was* properly vetoed. The City asserts that it wasn't properly vetoed because, under the Charter, the City Council's *action* is not subject to the Mayor's veto. When considered in this way, it is clear that the contract which was the subject of the *action* (and what it contained) is not the issue except in determining whether, under the Charter, the *action* is subject to the Mayor's veto.

If this court finds that the *action* was subject to veto and that the *action* was properly vetoed, it should not be distracted by how much was set in motion when the City disregarded a proper veto and went forward with executing and performing the contract in violation of the Charter. The old adage "the horse is out of the barn" should not be a reason to find that the contract was valid, and the City cites to no authority to support such a principle. It should not be a reason to throw up our hands because there is nothing we can do now. If approval of the contract never occurred, the City did not have discretion under the Charter to do what it did. This court can declare the contract void *ab initio* and instruct the City to calculate all monies paid out under the contract and recover them.

I.

THIS REPLY ADDRESSES THE CITY'S OPPOSING BRIEF *AND* THE COURT'S SEPTEMBER 3, 2019 RULING

Based on the court's ruling on Plaintiffs' ex parte application heard on Monday, October 21,

2019, this Reply addresses the City's opposing trial brief *and* issues raised in the court's ruling of September 3, 2019 on Plaintiffs' motion for summary adjudication of their cause of action for declaratory relief. In support of this Brief, Plaintiffs submit a Supplemental Index of Exhibits.

Also, as clarified at the October 21, 2019 hearing, this trial of bifurcated issues includes issues from both of the remedies sought in Plaintiffs' pleading, e.g., the writ petition and the cause of action for declaratory relief.

II.

NONE OF CITY'S OR THE COURT'S CASES SUPPORT A FINDING THAT BAILEY AND McQUERN LACK STANDING

The City and the court (in its September 3, 2019 ruling) rely on a host of cases that establish public interest standing to protect a public right. The City and the court then rely on the *Carstens*, *Braude* and *Holbrook* cases for the proposition that Bailey and McQuern lack that public interest standing. (See September 3, 2019 ruling at pp. 4-9; see *infra* for citations to the cases.) Bailey does not require public interest standing as he is the *only* person who has a beneficial interest in his veto authority, and McQuern still maintains her public interest standing notwithstanding that she participates voluntarily *as a member of the public* on the City's Charter Review Commission.

A. Bailey is the *only* person in the world who holds veto authority under the Charter and he is being prevented from exercising that authority.

As to Bailey, the court's September 3, 2019 ruling misinterprets Bailey's situation. Bailey is the holder of veto authority under the Charter. No other person holds that authority under the Charter, and that includes the members of the City Council. Moreover, the Mayor does not have the same voting rights as the City Council. The only time the Mayor votes is to break a tie (which, with a seven-member council, logically occurs when a member is absent or recuses himself). (INDEX0185; see also the City's Document 144, AR003076.)

The court should consider what the Mayor's recourse would be if he were locked in a closet every time the Charter allowed him to vote to break a tie or, as here, when he had authority to veto "formal action taken by vote of the City Council." He would be precluded from doing his job, exercising his right, the legal authority that only he has, vested in him under the Charter. Again,

whether one calls it a right or a duty, it is one that no one else in the world has (a dramatic statement but, nevertheless, true).

Bailey's position is not unlike that found in *Eiskamp v. Pajaro Valley Water Management Agency* (2012) 203 Cal.App.4th 97, relied upon by this court in its September 3, 2019 ruling on the question of a beneficial interest under Code of Civil Procedure section 1086. (See September 3, 2019 ruling at pp. 6-7.) *Eiskamp*, although a member of the board of directors for the respondent water management agency, owned the real property under consideration by the agency. (*Eiskamp v. Pajaro Valley Water Management Agency, supra,* 203 Cal.App.4th at pp. 104-105.) Thus, the court of appeal found that *Eiskamp* had standing to bring the action. (*Ibid.*)

In contrast, in *Carstens*, *Braude* and *Holbrook*, the petitioners were members of the board with the same voting rights as their co-members. The actions they brought were in the public interest, and had nothing to do with their voting rights. They had the ability to vote, and they were not precluded from voting. They just didn't find that their votes carried enough weight to overcome the same voting rights of their peers. In *Carstens,* "over petitioner's dissenting vote" as a board member, the Psychology Examining Committee Of The Board Of Medical Quality Assurance "substituted an objective national examination for the written portion of its test" for licensing applicants. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) In *Braude*, "[t]he city council voted 14 to 1 to approve [a building permit], with Braude casting the lone dissenting vote." (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 86.) In *Holbrook*, the petitioners were city council members with voting rights, who were unsuccessful in persuading the other council members to conclude city council meetings at 11:00 p.m. for the benefit of the public. (*Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1251-1254.) Noting that they had voting rights but were unable to persuade their peers to agree, the *Holbrook* court found that petitioners' "allegations pertain[ed] to the effective operation of government and the rights of the public, not to specific interests or rights of Holbrook and Katz individually." (*Id.* at p. 1254.)

Here, Bailey is not allowed to veto when he is authorized under the Charter to do so. No other elected official at the City has that authority. Only Bailey holds a beneficial interest in the veto authority. He is a paid officer of the City. It is his job. And he is effectively being locked in a

closet and prevented from doing his job. None of the cited cases support a finding that he does not have a beneficial interest in this case under Code of Civil Procedure section 1086.

B. McQuern's participation in the Charter Review Commission does not withdraw her public interest standing.

As noted in the Bailey Declaration (Plaintiffs' Trial Exhibit 2 at ¶ 23), service on the Charter Review Commission is a volunteer position under Section 1403 of the Charter. The public volunteers make recommendations on whether to propose new Charter language for a public ballot. Bailey appointed McQuern to the Charter Review Commission for which she receives no compensation as she is not a City employee. As a result, McQuern has no voting rights when it comes to City government. Nothing in the cases cited by the City or the court in its September 3, 2019 ruling requires a finding that she loses her public interest standing as described in *Carstens, Braude,* and *Holbrook* discussed, *supra.*

C. The case does not present a political question.

The court's September 3, 2019 ruling made reference (without citation to case authority) that the City's status as a "local agency" was the basis for the court's ruling on the City's motion for change for venue; and that Bailey's action somehow departs from that position now. The court also suggested that the local agency status requires a finding that this action arises from a political dispute such that *Carstens, supra,* applies. However, as noted, *supra, Carstens* does not apply. This is not an action by one City Council Member against another after both of them exercised their voting rights under the Charter.

This case arises from the Charter of the City of Riverside which establishes the checks and balances in city government. It is to be regarded by the courts as the City's Constitution. (*Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017; citing *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 898; *Brown v. City of Berkeley* (1970) 57 Cal.App.3d 223, 231.) "[A] charter is to a city what the state Constitution is to the state.' " (*Ibid.*; quoting *Campen v. Greiner* (1971) 15 Cal.App.3d 836, 840.) A charter is expected to be construed by the courts and "[u]nder settled rules of statutory interpretation." (*Creighton v. City of Santa Monica, supra,* 160 Cal.App.3d at p. 1017; citing *Hanley v. Murphy* (1953) 40 Cal.2d 572, 576.)

This case arises from violations of the City's Constitution. It seeks redress for actions by one branch of City government, e.g., the City Council (fueled by its City Attorney), actions which violated and continue to violate the right of another branch of its government – the Mayor and the veto right vested in him under the City's Constitution. No one else but the Mayor has that right. This court should not abdicate to its duty under the law – however distasteful or unpleasant – to construe the City's Constitution and to respond to Plaintiffs' requests for relief on the merits.

III.

THIS MATTER IS NOT SUBJECT *ONLY* TO THE CITY'S ADMINISTRATIVE RECORD

A. The Cause of Action for Declaratory Relief is not Subject to an Administrative Record.

In its ruling of September 3, 2019, the court acknowledged that Plaintiffs' cause of action for declaratory relief is not subject to an administrative record. (Supplemental Exhibit 20 at p. 14 of 14.) Thus, the Indices of Exhibits that Plaintiffs have submitted are proper.

B. Plaintiffs' Writ Petition is not Limited to the City's Unsolicited Administrative Record, Either.

This court must not be distracted from what Plaintiffs are attacking and what they seek. They are not attacking the legality of completed legislative action as the City contends. They are attacking whether the legislative action occurred at all. So whether the City Councilmembers had enough or the correct information about the Russo contract before them when they voted 5-2 to approve the Russo contract is not the issue. The issue is City Counsel's *subsequent* disregard for the Mayor's veto authority *after* they voted 5-2 to approve the Russo contract. This court is being asked to determine, as a matter of law, that the Mayor had veto authority, that he exercised it, and the City had no discretion to avoid it.

Because the City Council was bound to perform the ministerial act of scheduling a veto override vote, and because it didn't do so, the City had no discretion to execute and perform the contract. As a result, the City now has a ministerial duty to perform the math so the City can recover all consideration paid under the contract. When this issue, the real issue in this case, is considered, the City's arguments with regard to its unsolicited Administrative Record are specious and

misleading at best.

The City argues that evidence at trial must be limited to its unsolicited Administrative Record. The City premises this with its reliance on *Mike Moore's 24-Hour Towing v. City of San Diego* (1998) 45 Cal.App.4th 1294, 1303 which instructed that "[a] public entity's award of a contract and all of the acts leading up to the award, are legislative in character. . ." From this premise, the City argues that "judicial review of legislation is limited to the administrative record with 'rare' and 'narrowly construed' exceptions." (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578.) From there, the City cites to a number of a cases to show that, whether the action is for reverse validation, injunctive relief, mandamus or declaratory relief, this court's consideration of evidence is limited to the administrative record the City has selected. (Opposition at 16:13 – 17:11.)

Plaintiffs, on the other hand, argue that the Administrative Record is not applicable to their writ petition under Code of Civil Procedure section 1085 because the petition does not seek mandamus based on the propriety of a completed legislative decision. Plaintiffs argue that no legislative decision was completed at all.[1] Thus, Plaintiffs argue that not all mandamus actions under section 1085 will arise from an administrative record – and this is one of them. In *Western States*, the California Supreme Court stated that extra-record evidence is proper "in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute." (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 576.)

All of the City's cited cases arose from situations where a governing body was challenged over the propriety of a completed legislative decision based on the facts and procedures leading up to its vote, not the validity of the voting process. That is, the cases address the substance of information upon which the decisions were based (the sufficiency of the *evidence* before the governing body) not whether the governing body, in observing its voting requirements, properly discharged its duties in perfecting the vote, including recognizing a veto and properly taking steps to override it.

[1] And the City continues to perpetuate this course of conduct.

The earliest cited case was, in fact, *Western States, supra,* in 1995. *Western States* was an action under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at pp. 566-565.) The petitioner, Western States Petroleum Association (WSPA) filed an unsuccessful administrative petition before the Air Resources Board (ARB) and followed with "an action in superior court seeking both declaratory and mandamus relief on the grounds that [the air emissions] regulations [adopted by the ARB] were based on inaccurate and unsound data and that the ARB adopted them without complying with CEQA." (*Id.* at p. 566.) The Court held that review of the ARB's action must be made under the substantial evidence standard utilized by appellate courts. (*Ibid.*) It also found that extra record evidence (evidence not before the ARB) could not be used by a reviewing court in CEQA cases. (*Ibid.*) Nowhere in *Western States* did the Court examine the voting requirements for the ARB to determine whether the voting process in its charter or other governing documents were observed during the voting process. This is likely because CEQA applies to all public agencies within the state and does not establish how each agency obtains a proper vote among its members. (See Pub. Resources Code, § 21000, et seq.) The same factors distinguishing *Western States* from the present action may be said for the City's other cases.

Additionally, the City's argument that this matter must be limited to the Administrative Record as in *Western States* is defeated by the content of the record itself. The question here is not what the Council members knew about the propriety of approving the contract when they voted to approve the contract. So, when the City argues that *Western States* and its other cited cases support a finding that this action seeks a review of the letting of a contract, the City misses the point and misleads the court. This case seeks review of whether the process of voting and veto, as set forth in Charter, was followed.

Also, there is no evidence, and the City does not remotely suggest, that the content of its voluminous Administrative Record was considered by the City Council when it declined to recognize the Mayor's veto of the Russo contract. Incredibly, the City's purported Administrative Record begins with minutes of a City Council Meeting held on December 24, 1963 (Christmas Eve, nearly 56 years ago), followed by a host of other documents including minutes, agendas and

resolutions in 1964, 1966, 1981, 1994, 1995, 1996, 1998, 1999, 2002, 2004, 2005, 2007, 2010, 2013, 2014, 2015, 2016, and 2017. (AR000001-AR002215.) In addition:

1. The record also includes similar documents, including videos of selected city council meetings *after* February 6, 2018. (AR002503-AR002721.)

2. The record also includes the subsequent mortgage and life insurance concerning John Russo, ostensibly arising from his February 6, 2018 contract. (AR002722-AR002779.)

3. The record also includes subsequent Charter Review Committee documents generated after February 6, 2018. (AR002780-AR003069.)

4. In a supplement to the City's Administrative Record at SAR00001-SAR00004 (recently filed with the court on October 16, 2019) the City finally included a "Memorandum from Mayor William R. Rusty Bailey, III to Riverside City Council dated February 6, 2018 which purports to be the Mayor's written veto of the Russo contract (although the Supplemental Administrative Record has never been provided to Plaintiffs). The actual written veto is attached as Exhibit E to Plaintiffs' verified operative pleading and paragraph E of that pleading states "[t]hereafter, and within 20 days as required by Section 413 of the Charter and Article IV, section A of Resolution No. 23035, Mayor Bailey submitted his written bases for the veto to the City Council" attached as Exhibit E. (See Plaintiffs' Exhibit 5, INDEX0022.) This is uniquely interesting because the City's Verified Answer to Plaintiff's operative pleading (filed on July 27, 2018) *does not* admit that "Mayor Bailey submitted his written bases for the veto to the City Council." Rather, the Verified Answer states at paragraph 22 "the City admits the document attached to the Petition as Exhibit E is a copy of a letter from the Mayor that was provided to the public" and denies the remainder of paragraph 22. Notwithstanding, now the document is apparently part of the City's Administrative Record and certified by the City Clerk as a document maintained by the City. (See Plaintiffs' Exhibit 18, INDEX0804-0805.)

Additionally, what is disturbingly specious about the City's Administrative Record is that the following documents which are attached to the Plaintiffs' verified pleading are not part of the record:

5. A copy of City Council Resolution No. 23035 is nowhere to be found in the City's

Administrative Record. Exhibit C to Plaintiffs' verified operative pleading is a certified copy of that Resolution, Certified by the City Clerk on March 5, 2018.

6. Riverside Municipal Code, Chapter 2.32 entitled "Salary Regulations" (Exhibit H to Plaintiffs' verified operative pleading) is also nowhere to be found in the City's Administrative Record.

Finally, if that is not enough to call the City's Administrative Record into question, the City appears to have manipulated the Administrative Record.

7. Plaintiffs' Exhibit 9 in their Index of Documents for this bifurcated trial is City Council Memorandum dated February 6, 2018 (INDEX0252), a certified copy obtained from the City Clerk for the City of Riverside on March 5, 2018. At INDEX0253 it reflects that it is a memorandum to "Honorable Mayor and City Council" from the "Human Resources Department" and the subject is "Execution of the Employment Agreement with John A. Russo." The memorandum, which speaks for itself, recommends approval of the contract and indicates that the attachment is the subject employment agreement. (INDEX0253.) However, the City's Document No. 110 entitled "City Council Report and draft employment agreement" which is the same memorandum appears to have 241 more pages of attachments not referenced by the Memorandum. The purported attachments include a host of emails to and from various City officials, City personnel and the public exchanging information and opinions about the proposed contract before and AFTER February 6, 2018. These additional documents are not part of the City Council Memorandum of February 6, 2018 that was certified as a true and complete copy of that Memorandum and included as Exhibit 9 to Plaintiffs' Index of Exhibit for this bifurcated trial![2]

Not only is the City's Administrative Record suspect, this case presents disputed facts, the kind noted in *Western States* which warrant extra record evidence when facts are in dispute. (See *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 576.) Most importantly of

[2] The import of the extra 241 pages is discuss, *infra*, under the argument concerning Charter interpretation.

all, most of Plaintiffs' documents (e.g., exhibits to their pleading and in their Trial Exhibits) are also in the Administrative Record or are subject to judicial notice.

Plaintiffs' Exhibit 6 is the City's Document 144 found at AR003070.

Plaintiffs Exhibit 9 is the City's Document 110 found at AR002230 (albeit the document is 241 pages longer than Plaintiffs' Exhibit 9).

Plaintiffs' Exhibit 10 is the City's Document 111 found at AR002484.

Plaintiffs' Exhibit 11 is the City's Document 112 found at AR002494.

Plaintiffs' Exhibit 12 appears to be the City's Supplemental Document 1 found at SAR0001.

Plaintiffs' Exhibit 14 is the City's Document 98 found at AR002048.

Plaintiffs' Exhibit 15 resembles the City's Documents 74 through 78 found at AR001318.

This record does not reflect the legal arguments in the City's cited cases that this matter arises from completed legislative action and that the court should look no farther than all of the documents and information before the City Council on February 6, 2018.

Again, this court must not be distracted from what Plaintiffs are attacking and what they seek. They are not attacking whether the City Councilmembers had enough or the correct information about the Russo contract before them when they voted 5-2 to approve the Russo contract on February 6, 2018. Plaintiffs are attacking the City Counsel's *subsequent* disregard for the Mayor's veto authority *after* they voted 5-2 to approve the Russo contract. This court is being asked to determine, as a matter of law, that the Mayor had (and still has) veto authority, that he exercised it (and may do so in the future), and the City had (and has) no discretion to avoid it.

The City Council was bound by the Charter to perform the ministerial act of scheduling a veto override vote and, because it didn't, the City had no discretion to execute the contract. Also, since the City did not override the veto and arbitrarily undertook to execute and begin performance on the contract, it now has a ministerial duty to perform the math so the City can recover all consideration paid under the contract – a contract the City did not have discretion to execute and perform in the first instance.

This court should admit all of Plaintiffs' evidence in accordance with *Western States* as Plaintiff's petition is one of traditional mandamus to compel a ministerial duty and there are disputed

facts that can only be resolved by extra-record documents. (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 576.)

IV.

JOHN RUSSO IS NOT A NECESSARY OR INDISPENSIBLE PARTY

A. Mr. Russo's Interests are Adequately Protected.

The City filed its verified answer to the Plaintiffs' operative pleading on July 27, 2018. The verified answer does not contain an affirmative defense that John Russo is a necessary or indispensable party. In fact, the answer does not state that any person or entity should be added as a party to this case. (See INDEX0799.) This is consistent with documents maintained by the City and its attorneys showing that there is a unity in interest as between Mr. Russo and the City such that the City has a duty to defend him and his family. Plaintiffs received most of the documents, certified by the City Clerk, just this month pursuant to a document request under the Public Records Act. One additional document came from the City's litigation counsel in this case in response to a document request that accompanied a deposition notice. None of the documents are found in the City's Administrative Record.

Mr. Russo made a demand on the City by letter dated May 30, 2018 that the City defend and indemnify him and his family from the attack on his employment agreement in *Clymer v. City of Riverside*, Riverside Superior Court Case No. RIC 180666. (S INDEX0031.) The letter states, in pertinent part, "Mr. Clymer's lawsuit clearly arises out of my employment with the City and there should be no doubt that *the City is obligated to protect me and my family.*" (*Ibid*, italics added.) The letter continues, "Under the circumstances, I believe it best for all parties concerned for the City to retain separate counsel on my behalf so as to avoid any confusion *in the unlikely event the City and I have interests that diverge in the future.*" (*Ibid*, italics added.) According to the letter, Mr. Russo had contacted an attorney who is on the City's panel of approved counsel and requested that the he serve as his attorney. In less than 3 weeks, on June 18, 2018, the City Attorney Gary Geuss wrote Mr. Russo's chosen attorney confirming that the City was retaining his firm to represent Mr. Russo in the *Clymer* matter. (S INDEX 0033.) Mr. Russo's attorney responded 3 days later on June 21, 2018 accepting the representation "including acknowledgment and waiver of any potential conflict

of interest." (S INDEX 0100.)

The City filed its verified answer to Plaintiffs' operative pleading the following month and, as noted *supra*, it does not contain an affirmative defense that John Russo is a necessary or indispensable party. (Logically now, if Mr. Russo were to be joined, the City would have to pay his legal fees.) Thereafter, in October of last year, Mr. Russo's attorney and litigation counsel for the City in both this case and the *Clymer* case executed a Joint Defense Agreement ("JDA") evidencing counsel's agreement to coordinate and cooperate with regard to the defense of both the *Clymer* case and this case. (Exhibit 22, JDA, S INDEX0146, at B. RECITALS ["B. The Parties recognize that it is in their mutual, common, and best interest and consistent with law to cooperate with each other to the extent permitted by law to preserve, protect, and advance their common or joint defense interests regarding the Cases."].)

That this case and the *Clymer* case arise out of Mr. Russo's employment with the City is undisputed by Mr. Russo's letter and the City's acceptance of his defense. It is also borne out by the evidence. On February 6, 2018, the Human Resources Department for the City of Riverside – which according to Section 600 of the Charter is under the purview of the City Manager – issued a Memorandum to the Mayor and the City Council. (See Plaintiffs' Exhibit 6 at INDEX0189-0190 and Exhibit 9 at INDEX0252; see also the City's Document 110 at AR002234 and Document 144 at AR003080-AR003081.) Attached to the Memorandum was a proposed renegotiated contract for the City Manager. It was already signed by Mr. Russo as City Manager and approved as to content by the City Attorney. There were signature blocks for the Mayor, the Mayor Pro Tem and the City Clerk that were not signed. In the Memorandum, the Human Resources Department recommended that the City Council approve the contract so it could be signed by the Mayor, the Mayor Pro Tem and the City Clerk. Accordingly, Mr. Russo's interest in this case – to uphold the contract – is and has been fairly represented by the City's participation in this litigation, even during the joinder briefing for Plaintiff's motion for summary adjudication. That is, in submitting Mr. Russo's contract to the Mayor and City Council for approval, the City did so through a department under Russo's charge.

Moreover, cases such as *Deltakeeper*, *Citizens for Amending Proposition L*, and *Lungren*

take on new meaning. (Full case citations are set forth *infra.*) It should be noted, as well, that all three of these cases arise from factual scenarios where contracts were ostensibly entered into through completed approval by the public entities' governing boards. Thus, the question before the court each time was whether *the subject matter* of the contract violated the law, not whether the public entity observed its charter requirements in perfecting its ability to execute and perform the contract.

In *Deltakeeper v. Oakdale Irrigation District* (2001) 94 Cal.App.4th 1092, 1107, the court noted that it was sufficient to avoid joinder where "non-joined parties have interests in the litigation but the interests are adequately *protected* by the parties to the action." (*Ibid.,* citing *People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 880.) The *Deltakeeper* court asked what contribution a non-joined party would make to the litigation. (*Ibid.*) "In other words, what precisely are they foreclosed from doing by not being named as parties to the lawsuit?" (*Ibid.*) The answer was that they would have been limited to the same legal arguments presented by defendants in the action, e.g. " 'compliance with city ordinances when entering contracts' " which are " 'independent of the contractual rights ... established in the Agreement.' " (*Ibid.*)

In 2018, *Citizens for Amending Proposition L v. City of Pomona* addressed whether Regency Outdoor Advertising, Inc. (Regency) was an indispensable party to a citizens group's lawsuit against the City of Pomona. The City entered into a contract with Regency in June of 1993 whereby the City would receive remuneration for allowing Regency to erect advertising billboards alongside the freeways that passed through the City. (*Citizens for Amending Proposition L v. City of Pomona, supra,* 28 Cal.App.5th at p. 1165.) Within months, the electorate passed a ballot initiative "Proposition L (Prop. L), which prohibited the construction of additional billboards within city limits." (*Ibid.*) However, the Regency agreement, which was already in place, provided that it would expire in 10 years, and would " 'be automatically extended for a second ten (10) year term,' subject to' " other conditions not relevant to the action. (*Id.* at pp. 1166-1167.) At the end of the second contract term, the City Council approved an agreement to extend the contract another 15 years. (*Id.* at p. 1169.) The citizens group sued alleging that the City was without authority to enter into the contract extension due to the passing of Proposition L, and they did not join Regency as a party to the litigation. (*Id.* at pp. 1169-1170.) The trial court ultimately granted the citizens' petition

for writ of mandate and the City appealed. (*Id.* at pp. 1171-1172.) On appeal, among other things, the City argued that its demurrer and motion to strike should have been granted on the grounds that Regency was an indispensable party. (*Id.* at p. 1178.) The *Citizens* court relied on *Deltakeeper* and the City's interest in the contract, and it noted that Regency would be adequately protected because the City could "be expected vigorously to argue in favor of" upholding the contract. (*Id.* at p. 1184.)

In *People ex rel. Lungren v. Community Redevelopment Agency*, the challenge involved the City of Palm Spring's conduct in entering into a contract that the state Attorney General claimed could only be entered into by the state. (*People ex rel. Lungren v. Community Redevelopment Agency, supra,* 56 Cal.App.4th at p. 881.) The *Lungren* court relied on the United States Supreme Court holding in *National Licorice Co. v. National Labor Relations Board* (1940) 309 U.S. 350 (followed by the federal Court of Appeals for the Ninth Circuit in *Conner v. Burford* (9th Cir.1988) 848 F.2d 1441). In *National Licorice Co.*, company employees were not joined as parties to an action to set "aside contracts the National Licorice Company had obtained from its employees by means of unfair labor practices." (*People ex rel. Lungren v. Community Redevelopment Agency, supra,* 56 Cal.App.4th at p. 881.) The *Lungren* court emphasized that *Conner* did not adjudicate the rights of the parties not before the court, and that this is okay because the contracts themselves were unlawfully entered into. (*People ex rel. Lungren v. Community Redevelopment Agency, supra,* 56 Cal.App.4th at p. 881.)

These cases, in light of the recently-obtained letters between the City on the one hand and Mr. Russo/his attorney on the other, together with the JDA, show that the City conceded to Mr. Russo's assertion that it owes him a defense and indemnity because the issues in the *Clymer* case and this case relate to his employment with the City. Moreover, under the JDA, the City has agreed to coordinate its defense in this and the *Clymer* case so as not to interfere with Mr. Russo's defense. The evidence also shows that the City acted through a department under Mr. Russo's charge in submitting the contract to the Mayor and the City Council for approval in the first instance. Thus, as in *Citizens for Amending Proposition L* Mr. Russo is adequately protected because the City can "be expected vigorously to argue in favor of" upholding the contract. (*Citizens for Amending Proposition L v. City of Pomona, supra,* 28 Cal.App.5th at p. 1184.)

B. The Mortgage Referenced in the Russo Contract does not Prevent this Court from Granting the Requested Relief.

In its September 3, 2019 ruling, the court was concerned that Plaintiffs seek a declaration that the Russo contract and the mortgage that subsequently resulted be declared void. A careful review of Plaintiffs' operative pleading shows that Plaintiffs are not seeking such a declaration with regard to the mortgage. To be sure, the employment contract allowed the City to provide a mortgage to Mr. Russo, and the City's Documents 129 through 134 (AR002722, et seq.) evidence that the City is the lender based on a Promissory Note and Deed of Trust executed only by the Russos.

" '[C]ontracts that are contrary to express statutes or to the policy of express statutes ... are illegal contracts [and] any such illegality voids the entire contract.' " (*Duffens v. Valenti* (2008) 161 Cal.App.4th 434, 451.) A so-called void contract is not a contract at all. (*Kozlowski v. Adams* (1929) 102 Cal.App. 578, 581.) If the employment agreement which authorized the City to provide Mr. Russo's mortgage is void, then the City had no authority to provide that mortgage and the promissory note secured by the deed of trust could be construed to be an illegal contract and necessarily void. Thus, the City's payment of $675,000 in exchange for a promissory note secured by a deed of trust is an unlawful gift of public funds. However, the court is not asked here to go any farther than to determine that the employment contract is void because the City Council's vote to approve it was vetoed.

The *Clymer* action, to which Mr. Russo is a party, can take the next step. However, is this not precisely why Mr. Russo demanded a defense and indemnity and the City accepted that demand? It is incumbent on them to resolve between them the unlawful gift of public funds that is the mortgage. Moreover, Paragraph 14 of the Promissory Note anticipates that all or part of the promissory note could ultimately be invalid or illegal. (The City's Document 131, at AR002731.)

V.

THE TERMINATION OF JOHN RUSSO DID NOT RENDER THIS ACTION MOOT

As to Plaintiff's writ petition, the notion that termination of John Russo rendered Bailey's writ petition moot ignores that thousands of dollars which should be in the City's possession are in the possession of John Russo under a void contract. The petition seeks the ministerial act of

calculating the amount of those funds and an order that the City undertake to recover them. Since Mr. Russo's interests are being protected by the City in this action, there is nothing to prevent this court from making those orders.

As to the declaratory relief cause of action, as noted on Plaintiffs' opening trial brief, in addition to presenting an actionable controversy as to whether the contract is void *ab initio* such that monies paid out thereunder should be calculated and recovered, it also seeks a judicial determination and declaration that Mayor Bailey has veto authority over personnel actions concerning Charter Officers such as the City Manager, the City Attorney and the City Clerk. Without this, he and his successors will continue to be locked out of personnel decisions as to those Charter Officers. As noted in *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 footnote 2, " 'while it has been said that the declaratory judgment acts necessarily deal with the present rights, the "present right" contemplated is the right to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future.' " (*Ibid.*, quoting 15 Cal.Jur.2d 116, citing Borchard, Declaratory Judgments (2d ed.) pp. 927-929.) Moreover, an exception to dismissal based in mootness "has been applied to actions for declaratory relief upon the ground that the court must do complete justice once jurisdiction has been assumed [citation], and the relief thus granted may encompass future and contingent legal rights. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind, supra,* 67 Cal.2d at p. 541.)

VI.

THE CHARTER LANGUAGE IS CLEAR AND UNAMBIGUOUS IN FAVOR OF PLAINTIFFS' INTERPRETATION

Plaintiffs refer to their Opening Trial Brief that sets forth their arguments, including those as to the myopic weak mayor/strong mayor concept. However, in reply, Plaintiffs additionally note that the City's opposition provides a copy of the current Charter (Document 144, AR003070) and implies – based on Council agendas, resolutions, minutes and other documents it has produced dating back to 1963 – that the current version of the Charter has the same provisions as the Charter that existed in 1963 (and every year thereafter). (See also Plaintiffs' Exhibit 6, INDEX0176.) However, the current Charter evidences on its face that the various Sections have different effective

dates. For example, Section 405 on the duties of the Mayor shows effective dates of "12/27/95 and 12/11/86" without reference to the language that applies to those dates. Many, many other paragraphs show similar effective dates.

The myopia extends to the City's focus on selective Charter passages in order to bring the Charter within its favored "weak mayor" paradigm, to the detriment of interpreting the document as a whole. On the other hand, Plaintiff's Opening Trial Brief construes the Charter provisions in the context of the Charter as a whole and Plaintiffs take great care in explaining how the Charter provisions as a whole favor the Mayor's veto authority over personnel actions concerning Charter Officers. Is a weak Mayor elected by the entire City electorate? Does a weak Mayor vote to break a City Council tie? Is a weak Mayor able to veto resolutions? Is a weak Mayor able to veto ordinances? Does a weak mayor, along with "[c]ity agencies, boards, commissions, committees, officials, staff and officers, including [] members of the City Council, exist to conduct the people's business." (See Charter at Section 201, INDEX 0182.)

Most importantly, when a Charter provision governing veto authority expressly lists only three (3) exceptions to that veto authority, why should other exceptions be imposed that are not specifically stated in veto language proper? (See Charter at Section 413, INDEX 0187.) The Plaintiffs refer again to their Opening Trial Brief. The answer to interpreting the Charter for the City of Riverside is to ignore the weak/strong mayor labels and simply read the clear and unambiguous language in the Charter.

Additionally, any question as to what is meant in Section 413 by "the Mayor may . . . veto any *formal action* taken by vote of the City Council including any ordinance or resolution, except an emergency ordinance, the annual budget or an ordinance proposed by initiative petition," can be resolved by Section 201 of the Charter. (Charter, § 413, underline and italics added, INDEX 0187, see also Section 201, INDEX 0182-0183.) Section 201 of the Charter (INDEX 0182-0183) provides, in pertinent part: "the provisions of the Ralph M. Brown Act (California Government Code section 54950, et seq.) [] shall apply to the City Council, and any commission, committee, board or other body created by Charter, ordinance, resolution or *formal action* of the City Council, or the Mayor." (Underline and italics added.) The Ralph M. Brown Act establishes how public entities

must conduct themselves for the benefit of an informed public. In enacting it, the Legislature did not define *formal action*.[3] (See Gov. Code, § 54950, et seq., specifically § 54952, subdivision (b) [in defining "legislative body" the Legislature gives the following examples: (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or *formal action* of a legislative body. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or *formal action* of a legislative body are legislative bodies for purposes of this chapter." Underline and italics added.].)

However, and most importantly, the Legislature did define *action taken*. "As used in this chapter, 'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Gov. Code, § 45956.2.) This is "formal action taken by vote of the City Council" and this is precisely how the City Council approves Charter Employee personnel actions. However, in the Charter, it's referred to as "*formal action taken* by vote of the City Council." (Charter, § 413, underling and italics added; INDEX 0187.)

There is no need to compare other charters, either. In fact, the other charters proffered by City are not properly authenticated and lack foundation. Moreover, to judicially notice them does not allow the court to take judicial notice of the truth of the content. (See *Arce v. Kaiser Foundation*

---

[3] The Brown Act admonishes at Government Code section 54950 "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

Health Plan, Inc. (2010) 181 Cal.App.4th 471, 482 ["While courts may take judicial notice of court records and official acts of [public entities], the truth of matters asserted in such documents is not subject to judicial notice. [Citation.]"].) Also, it's one thing to judicially notice a newspaper article or reference materials. It's another to try to pass off downloaded documents off as official documents.

This action seeks a judicial interpretation of the clear and unambiguous language in the current Charter for the City of Riverside. Where the "legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; no resort to extrinsic aids is necessary or proper. [Citations.]" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119–1120.) Here, the proffered, albeit arguably inadmissible, legislative history proffered by the City actually buttresses Plaintiffs' Charter interpretation. (See *id.* at p. 1120.) That is, if the electorate decided in past Charters to withdraw from the Mayor some powers and grant him others until the current Charter resulted, those changes only show how the Mayor's current authority is not proactive authority as is the City Council's authority.[4] Instead it is reactive. He now reacts by voting only when there is a tie, and may veto "any formal action taken by vote of the City Council" except under three specifically stated exceptions (and Charter Officer personnel actions are not among those exceptions). The Mayor's veto authority is comparable to the authority of the President of the United States, while having no vote in Congress, to veto Congress subject to a veto override vote. This is a balance of powers.

Finally, it is under the guise of Charter interpretation that the City's modified Document 110 at AR00234 has been employed. Clearly the City's version of the City Council Memorandum of February 6, 2018 (which references but one attachment, e.g., the Russo contract) has been manipulated to get 241 pages of extra record evidence into the record while still claiming that only evidence in the record can be reviewed by this court. As noted, *supra*, the certified copy of the Memorandum and attachment obtained by Plaintiffs from the City Clerk on March 5, 2018 was nine

---

[4] See the City's Document 145 at AR003098, an opinion from the law firm of Rutan & Tucker that opined on February 5, 2018 that Mayor Bailey does in fact have authority to veto a City Manager's contract. This opinion also provides the historical documents to show why.

(9) pages including the Memorandum and the attached Russo contract. The manipulated version in the Administrative Record contains 241 additional pages which the City uses to assert that the Mayor has been abusing his "voice" as that term is employed in Section 405 of the Charter. Pages of 28 and 29 of the Opposing Trial Brief states:

> Section 405 – Giving the Mayor "a voice" in the City Council's debates pointedly does not give him a "vote" or "veto"; those are provided by other more specific provisions. Moreover, Bailey has not been denied a "voice" here; his views of Russo's contract amendment are well known and he encouraged his political supporters to urge the City Council to reject the amended Russo contract. (110 AR 2343.) His office may be primarily ceremonial, but it provides a bully pulpit. The City Manager, to, is entitled by the Charter to a voice at City Council meetings (144 AR 3081 at § 602); but, like the Mayor, he has neither vote nor veto by virtue of that language. The Mayor's limited rights to vote on and to veto, legislation are provided by more specific provisions which demonstrate their intended reach.

(The City's Opposing Trial Brief at 28:23-29:4.)

In addition to the fact that the extra 241 pages added to the Memorandum of February 6, 2018 are not really a part of that document, this argument is a misleading cheap shot that has no foundation in the Charter. Nowhere does the Charter say that the Mayor's function is "primarily ceremonial." That language comes from the "weak mayor" label that the City attempts to place on the Office of the Mayor to subconsciously direct this court's reasoning. This court must take care to read the Charter language only and not to accept such misleading argument as dispositive.

VII.

A WRITTEN RESOLUTION WAS, IN FACT, REQUIRED FOR BOTH RUSSO'S AND GEUSS' CONTRACTS

Section 702 of the Charter provides that one of the duties of the City Attorney is to "[p]repare any and all proposed . . . resolutions." (INDEX0064, see also the City's Document 144, at AR003082.) As noted in Plaintiffs' Opening Trial Brief at pages 15 and 16, the City Attorney, Gary Geuss, did not prepare a formal resolution when his renegotiated employment contract went

before the City Council for approval in December of 2017. Nor did he prepare one when the subject Russo contract went before the City Council on February 6, 2018. However, Section 2.32.030 of the City's Municipal Code requires that "[t]he basic monthly compensation plan for City officers and employees shall be established by resolution of the City Council." (Plaintiffs' Exhibit 7, INDEX0209.) Notably this Section of the Municipal Code is not included in the City's purported Administrative Record.

Plaintiffs' evidence shows that, when Messrs. Geuss and Russo were initially hired, formal resolutions were prepared and voted on by the City Council. Under Section 413 of the Charter that allows the Mayor to veto ordinances and resolutions, had a formal resolution been submitted with Russo's contract, there would have been no dispute that Mayor Bailey had veto authority of the City's Council's approval of the Russo contract. However, by omitting formal written resolutions with both the Geuss and Russo renegotiated contracts, the City argues now that the veto authority does not exist.

Ignoring the Municipal Code, the City argues that no formal written resolution was required at the time the City Council voted 5-2 to approve the subject Russo contract. Written or otherwise, it was done in the past and the Municipal Code requires a resolution when it comes to changing Charter Officer Compensation. Either the City must concede that the 5-2 vote was a vote on a oral resolution or a written resolution was required. Either way, under Section 415 of the Charter, the Mayor has expressly-stated veto authority over resolutions. The City's argument is without merit.

VIII.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court decide paragraphs 1, 3, and 5 of their operative pleading (and paragraph 7 as it applies to them) as follows:

- By making judicial declaration and determination that the Office of the Mayor of the City of Riverside has veto authority over "any formal action taken by vote of the City Council. . . , except an emergency ordinance, the annual budget or an ordinance proposed by initiative petition," and that that express language in the Charter allows

the Office of the Mayor to veto City Council approval of contracts, including contracts of City employees who serve at the pleasure of the City Council (Paragraph 1 of Plaintiffs' Prayer for Relief);

- By issuing a peremptory writ of mandate or other extraordinary relief directing the City to acknowledge and honor Mayor Bailey's veto of February 6, 2018 with regard to the City Council's approval of the City Manager's Contract and declaring the City Manager's Contract void *ab initio* such that all monies paid there under must be recovered by the City (Paragraph 3 of Plaintiffs' Prayer for Relief); and
- By issuing a peremptory writ of mandate or other extraordinary relief directing the City to perform an accounting of all monies paid to former City Manager, John Russo, under the void City Manager's Contract, to calculate the monies John Russo would have instead been entitled to in 2018 under his former contract up to and including the date of his termination (including severance), to apply those sums as an offset to recoverable monies under the void City Manager's Contract, and to proceed to take action to recover the difference from Mr. Russo (Paragraph 5 of Plaintiffs' Prayer for Relief).

Respectfully submitted,

DATED: October 28, 2019

THOMPSON & COLEGATE LLP

By: _____
SUSAN KNOCK BECK
Attorneys forPetitioners/Plaintiffs,
WILLIAM R. ("RUSTY") BAILEY III,
MARCIA McQUERN, and THOMAS MULLEN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am employed in the County of Riverside, State of California. I am over the age of 18 years and not a party to the within action. My business address is **3610 Fourteenth Street, P. O. Box 1299, Riverside, California 92502.**

On October 28, 2019, I served the foregoing document described as **REPLY TRIAL BRIEF BY PETITIONERS/PLAINTIFFS ON THE BIFURCATED ISSUES OF THE MAYOR'S VETO AUTHORITY, INCLUDING HIS EXERCISE OF THAT AUTHORITY, THE EFFECT OF THE EXERCISE OF HIS AUTHORITY, AND RELATED ISSUES** on the interested parties in this action.

☒ by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **BY REGULAR MAIL:** I deposited such envelope in the mail at 3610 Fourteenth Street, Riverside, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY FACSIMILE MACHINE:** I transmitted a true copy of said document(s) by facsimile machine, and no error was reported. Said fax transmission(s) were directed as indicated on the service list.

☐ **BY OVERNIGHT DELIVERY:** I caused such documents to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressees. The envelope or package was deposited with delivery fees thereon fully prepaid.

☒ **BY ELECTRONIC MAIL:** I transmitted a true copy of said document(s) via electronic mail, and no error was reported. Said email was directed as indicated on the service list.

☐ **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

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

Executed on October 28, 2019, at Riverside, California.

ERMINIA OLIVAS

SERVICE LIST

Michael G. Colantuono, Esq.
Ryan Thomas Dunn, Esq.
John L. Jones II
COLANTUONO, HIGHSMITH & WHATLEY, PC
790 E. Colorado Blvd., Ste. 850
Pasadena, CA 91101-2109

Attorneys for: Defendant, CITY OF RIVERSIDE

Tel: (213) 542-5700
Fax: (213) 542-5710

E-mail: Mcolantuono@chwlaw.us
Rdunn@chwlaw.us
jjones@chwlaw.us