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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

LADONNA YUMORI KAKU, WESLEY KAZUO MUKOYAMA, UMAR KAMAL, MICHAEL KAKU, and HERMINIO HERNANDO,

Plaintiffs,

vs.

CITY OF SANTA CLARA; and DOES 1 to 50, inclusive,

Defendants

Case No.: 17-CV-319862

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT MOTION FOR AWARD OF REASONABLE ATTORNEYS' FEES

Date: November 30, 2018
Time: 9 a.m.
Dept: 5
Before: Hon. Judge Kuhnle

Judgment on Merits and Remedy Entered: July 24, 2018

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I. INTRODUCTION

In this California Voting Rights Act ("CVRA") action, Plaintiffs succeeded in vindicating the fundamental rights of the citizens of the City of Santa Clara not only to vote, but to have their votes counted on an equal basis in electing members to the City Council. This groundbreaking case was the first Asian American voting rights challenge to an at-large election system to be successfully tried to judgment. The litigation has already wrought a radical and long-overdue change in City elections: Santa Clara is less than a month away from holding its first-ever district-based City Council elections.

Plaintiffs' Counsel achieved these transformational results despite stubborn opposition from the City of Santa Clara ("the City"). The City's determination to litigate this case to the end made this only the third case to go to trial under the CVRA since the enactment of the statute. Yet the City's intransigent posture belies the reality that it has been on notice since 2011 that its at-large election system violated the CVRA—as confirmed by its own demographer's September 2011 analysis. Although Plaintiffs' CVRA claims spurred the City to pursue its own, flawed efforts at reform through a proposed charter amendment, the City continued to contest its liability under the CVRA, refused repeated offers of settlement and invitations to settlement discussions, and is now pursuing an appeal.

Plaintiffs' Counsel had to expend considerable time and effort to see the case through to the current, successful implementation of a district-based election system. In doing so, Plaintiffs' Counsel litigated the case both quickly and efficiently, completing the liability phase trial only a little more than a year after the original complaint was filed by Plaintiff Mukoyama, and obtaining a remedial order by the end of July 2018, in time for districts to be implemented for the November 2018 City Council elections.

Plaintiffs' Counsel are now entitled to a reasonable attorney fee under the framework originally set out in *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977) ("*Serrano III*"). Consistent with that framework, and as set out in the accompanying declarations, Plaintiffs' Counsel have calculated a lodestar amount reflecting their time reasonably spent on the matter multiplied by their reasonable hourly rates. In the circumstances of this complex, novel voting rights case, Plaintiffs respectfully submit that the lodestar amount (except for the amount corresponding to time seeking fees and costs) should be enhanced to reflect the difficulty of the issues involved, Counsel's exceptional skill in

presenting and resolving those issues, the significant contingency risk accepted by Plaintiffs' Counsel, the preclusion of other income-generating employment, and the exceptional results and important public benefit obtained through the litigation.

II. ARGUMENT

A. Plaintiffs Are Entitled to Fees Under the CVRA

The CVRA directs that prevailing plaintiffs should be awarded "a reasonable attorney's fee consistent with the standards established in *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48-49." Cal. Elec. Code § 14030. *Serrano III* established the private attorney general doctrine of fee recovery in California law in recognition that reasonable fee awards must be available in order to attract competent counsel to otherwise non-paying cases vindicating important rights. *See* 20 Cal. 3d at 43-45. The applicability of this principle to the CVRA is plain: voting rights cases are complex and costly to litigate and offer no prospect of monetary recovery, yet the rights they seek to enforce are of the highest order, going to "the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Fee awards under the CVRA that are adequate to attract and compensate skilled counsel are essential to enabling the protection of these fundamental voting rights.

Plaintiffs, having prevailed in every material respect, are now entitled to recover attorneys' fees. Cal. Elec. Code § 14030; Am. Statement of Decision Re: Remedies Phase of Trial; Judgment 10, July 24, 2018. Plaintiffs obtained a liability determination that the City's at-large council elections violated the CVRA, fended off the flawed multi-member district proposal the City put forward as a charter amendment measure, and ultimately succeeded in their core objective of implementing single-member districts that could provide Asian American voters a realistic opportunity to elect candidates of their choice. Moreover, Plaintiffs overcame the City's stubborn efforts at delay and were able to obtain a remedial order in time to hold the regularly scheduled November 2018 elections under a lawful, district-based plan. The law requires that Plaintiffs' Counsel be compensated for the effort, skill, and contingency risk necessary to achieve these exceptional results. Cal. Elec. Code § 14030.

B. Calculation of the Fee Award

Under the *Serrano III* framework invoked by the CVRA, a fee award to a prevailing plaintiff "begins with a touchstone or lodestar figure, based on the 'careful compilation of time spent and

reasonable hourly compensation of each attorney . . . involved in the presentation of the case.'" *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001) (quoting *Serrano III*, 20 Cal. 3d at 48). The lodestar or touchstone figure yields the "basic fee for comparable legal services in the community." *Id.* at 1132. Courts should then adjust that figure to account for such factors as "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award," *id.* and (5) the results obtained, including the nature and importance of the rights protected, *Harman v. City & Cnty. of San Francisco*, 136 Cal. App. 4th 1279, 1316 (2006).

As set out below, after exercising billing judgment, Plaintiffs have calculated their counsel's lodestar as $2,301,964.24. Baller Decl. ¶ 17. This figure represents 3,803.85 hours of attorney and paralegal hours, compensated at Counsel's reasonable hourly rates. *Id.* In light of the skill demonstrated by Counsel in resolving the novel and complex issues presented by this litigation, the significant contingency risk assumed by Counsel in accepting the representation, the preclusion of other employment resulting from the time-intensive requirements of the case, and Plaintiffs' resounding success in vindicating the rights of Asian American voters in Santa Clara, Plaintiffs respectfully suggest that a multiplier of 1.8 would be appropriate for all work entailed in developing and successfully prosecuting Plaintiffs' claim. Plaintiffs' Counsel also seek to recover their lodestar fees for work on this request for award of fees and costs, without enhancement. For all of their attorneys' work as of September 2018, Plaintiffs seek to recover a total fee award of $2,301,964.21. Baller Decl. ¶ 17.[1]

1. <u>The Number of Hours Claimed by Plaintiffs is Reasonable</u>

"[A]n attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*" on a matter. *Ketchum*, 24 Cal. 4th at 1133 (emphasis in original). Courts have cautioned that "[b]y and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case[.]" *Kerkeles v. City of San Jose*, 243 Cal. App. 4th 88, 104

[1] The fees submitted in this request are current through September 14, 2018 for ALA, September 17, 2018 for Robert Rubin, and September 30, 2018 for GBDH. Plaintiffs' Counsel will submit updated fee amounts reflecting additional work on this motion at a later date.

(2015) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). Plaintiffs' Counsel should be compensated for the hours they reasonably claim, which represent a judicious reduction from the total hours devoted to the case.

a. Plaintiffs' Counsel's Hours Matched the Demands of the Case

Time reasonably spent includes "every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest[.]" *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) (quotation marks omitted);[2] *see also Ramon v. Cnty. Of Santa Clara*, 173 Cal. App. 4th 915, 924 (2009) (same). By this fee motion, Plaintiffs' Counsel seek to recover compensation for the time they reasonably spent on this case, including *inter alia*, in investigating the claims, engaging in settlement communications with the City, researching and presenting legal issues, conducting discovery, developing the extensive expert evidence necessary for both phases of trial, averting the adoption of an unlawful election system that would have continued to violate the CVRA, preparing for and conducting two phases of trial, monitoring the implementation of the remedial order, researching issues related to the appeals filed by the City, and moving for fees. Each of these activities was "reasonably necessary to the conduct of the litigation." *Robertson v. Fleetwood Travel Trailers of Cal., Inc.*, 144 Cal. App. 4th 785, 818 (2006); Baller Decl. ¶ 80. Plaintiffs' Counsel made every effort to staff and litigate this case efficiently. Each of the three organizations representing Plaintiffs took the lead on different aspects of the case, enabling the legal team to handle the many moving parts of this fast-paced litigation without redundancy. Baller Decl. ¶ 74. A categorization of billed time by litigation tasks confirms that Counsel's work was efficient, reasonable, and matched to the needs of the case:

Code	UTBMS Description	Hours	Fees
C400	Third Party Communications	149.95	$ 76,767.75
L110-L190	Case Assessment, Development and Administration	881.90	$ 561,643.50
L210-L230	Pre-Trial Pleadings and Motions	586.55	$ 373,606.75
L300-L340	Discovery	473.50	$ 302,561.00

[2] Federal fee shifting case law is considered persuasive authority in California courts, *Westside Cmty. for Indep. Living, Inc. v. Obledo*, 33 Cal. 3d 348, 352 (1983), although there are significant points on law on which California precedent has "diverged" from federal precedent, *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 569-59 (2004).

Code	UTBMS Description	Hours	Fees
L410-L470	Trial Preparation and Trial	1,742.95	$ 1,021,851.75
L500	Appeal	17.40	$ 9,159.50
L600	Fees and Costs	151.80	$ 77,530.00
Subtotal		4,004.05	$ 2,423,120.25
Five Percent Billing Judgment		(200.20)	$ (121,156.01)
Total		**3,803.85**	**$ 2,301,964.24**

Baller Decl. ¶¶ 85-106 & Ex. 5.[3] This distribution of hours reflects the involved substantive and frequent case management conferences, extensive independent investigation and expert work, and significant research, drafting, and preparation for the two demanding phases of trial. *Id*. & ¶¶ 87-106.

A comparison with the only other CVRA case to be litigated through both phases of trial, *Jauregui v. Palmdale*, No. BC483039 (L.A. Cnty Super. Ct) confirms the reasonableness of Counsel's hours spent in litigating this case. In their post-trial motion for attorneys' fees, counsel to the *Jauregui* plaintiffs claimed more than 4,600 hours; the trial court found the hours reasonable, cutting only a little over one hundred hours from time claimed by the plaintiffs' two trial firms. Baller Decl. ¶ 81. Plaintiffs' total of 3,803.85 is comparable to, and indeed less than, the hours approved by the court as reasonable in Palmdale.

Plaintiffs repeatedly sought to avoid the need for such extensive litigation, sending three successive demand letters and making repeated settlement offers. Baller Decl. ¶ 60. Plaintiffs believed that settlement would benefit both parties, particularly since the City's own demographer had previously found and confirmed that there was evidence of racially polarized voting and the City was actively moving away from its at-large system. Even the Court suggested that the City consider stipulating to liability and focusing on remedies, since the City was already seeking to change its at-large system. Baller Decl. ¶ 61. The City, of course, failed to act on these suggestions. While the City certainly had the right to decline settlement and contest every aspect of Plaintiffs' case in court, a defendant in a fee-shifting case "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *Serrano v. Unruh*, 32 Cal. 3d 621, 638 (1982)

[3] A more detailed breakdown of time spent on different litigation tasks is provided in Exhibit 5 of the Baller Declaration.

("*Serrano IV*") (quoting *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C.Cir. 1980)); *Peak-Las Positas Partners v. Bollag*, 172 Cal. App. 4th 101, 113 (2009) (affirming the trial court's finding that the defendant's "vigorous defense necessitated a great deal of work by experienced attorneys" and justified the requested fees with only slight reductions).

b. Plaintiffs' Counsel Have Exercised Significant Billing Judgment to Eliminate Charges for Any Possible Duplication of Work

Plaintiffs' Counsel carefully reviewed the detailed time records submitted by all attorneys, paralegals, and law clerks who billed time to this case. In conducting that review, Plaintiffs' Counsel eliminated 144.7 hours of billed time.[4] Baller Decl. ¶ 84. This preliminary reduction eliminated time spent in 2011 investigating the claim and communicating with the City about the violation. Plaintiffs' Counsel also deducted time spent by junior legal staff on activities like attending court hearings and reviewing pleadings not directly tied to their principal assignments on the case. Other time records were stricken as vague or duplicative. *Id.*

Following the initial deductions, Plaintiffs' Counsel then applied an across-the-board 5% reduction to the lodestar to account for any potential residual redundancies. Baller Decl. ¶ 84. Plaintiffs' exercise of significant billing judgment supports a finding that the hours claimed in this fee motion are reasonable. *See Syers Props. III, Inc. v. Rankin*, 226 Cal. App. 4th 691, 700 (2014) (noting counsel's voluntary exercise of billing judgment as a factor supporting the reasonableness of counsel's hours computation).

No further reduction for duplication is warranted. A reduction in hours "is warranted only if the attorneys are *unreasonably* doing the *same* work." *Johnson v. Univ. Coll. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original). The hours spent by multiple attorneys on the same task may be fully compensated if they reflect the "distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Id.* Thus, where the participation of multiple attorneys at a court hearing or on a call with an expert or fact witness was necessary to ensure that all topics were adequately and skillfully addressed, those hours should be duly

[4] Plaintiffs' Counsel's time records contain a large amount of privileged attorney-client communication and attorney work-production information. Those records can be made available, following redaction of privileged information, if required.

compensated. *See id*. In the professional judgment of Plaintiffs' Counsel, such multiple staffing was frequently necessary as a result of the fast pace and complexity of this litigation. Baller Decl. ¶ 78; *see Kerkeles*, 243 Cal. App. 4th at 104 (deference owed to the attorneys' professional judgment). The billing judgment exercised by Plaintiffs' Counsel, including the sizeable across-the-board 5% reduction, is more than adequate to eliminate any unnecessarily duplicative time. *See Ridgeway v. Wal-Mart Stores, Inc.*, 269 F. Supp. 3d 975, 990-91 (N.D. Cal. 2017) (finding a 5% reduction was adequate to account for allegedly excessive and redundant time).

The reasonableness of Plaintiffs' staffing is confirmed by opposing counsel's reliance on a comparably sized legal team. At the liability phase trial, the City was represented by four law firm partners or principals. Baller Decl. ¶ 79. Plaintiffs are also aware from their interaction with opposing counsel that at least three additional attorneys at Churchwell White were significantly involved in representing the City. *Id.*

c. Plaintiffs' Counsel Should be Compensated for the Hours Reasonably Spent in 2016-2017 Prior to Filing the *Yumori Kaku* Complaint

Plaintiffs are entitled to compensation for the hours reasonably spent on the case prior to filing of the complaint. *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177, 189-90 (2014); *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 987-88 (9th Cir. 2001). Plaintiffs seek compensation for the prefiling investigation as well as for fees incurred litigating the March 2017 CVRA complaint (the "*Mukoyama* complaint").

i. Pre-Filing Investigation and Legal Work

Plaintiffs' Counsel conducted a robust pre-filing investigation prior to initiating this litigation. Hours spent on a matter prior to filing a complaint are compensable if they are "'both useful and of a type ordinarily necessary to advance . . . the litigation in general.'" *Ray Haluch Gravel Co. v. Cent. Pension Fund*, 571 U.S. 177, 189-90 (2014) (quoting *Webb v. Dyer Cty. Bd. of Ed.*, 471 U.S. 234, 243 (1985)); *see also Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 987-88 (9th Cir. 2001) (affirming fee award for "conferences with clients, drafting the complaint and other reasonable efforts directed toward filing the litigation" prior to filing). In *Ray Haluch Gravel Co.*, the Supreme Court affirmed an award of fees for time spent on "[i]nvestigation, preliminary legal research, drafting of

demand letters, and working on the initial complaint." 571 U.S. at 189-90 (citing *Webb*, 471 U.S. at 250 (Brennan, J., concurring in part)).

Plaintiffs' Counsel's prefiling hours are reasonable. As a recent federal decision explains, voting right litigation "requires an extensive factual investigation involving expert analysis of demographics and electoral histories, as well as the relevant Senate factors." *Montes v. City of Yakima*, No. 12-CV-3108-TOR, 2015 WL 11120966, at *8 (E.D. Wash. June 19, 2015). In *Montes*, the court approved fees for prefiling work with experts; "efforts spent identifying witnesses and developing testimonial evidence in advance of filing a properly supported complaint;" "communication between counsel regarding the pre-filing investigation and planned legal strategy;" "hours spent researching and drafting demand letters and the complaint;" and "hours spent performing community outreach to identify and meet with potential plaintiffs and witnesses." *Id.* at *8-9. Like the attorneys in *Montes*, Plaintiffs' Counsel reasonably invested substantial time in conducting a thorough pre-filing investigation including expert witness analyses, strategizing with co-counsel, identifying plaintiffs and potential witnesses, drafting demand letters and communicating with the City, and preparing the complaint. *See id.*

ii. Litigation and Further Investigation Following the Filing of the *Mukoyama* Complaint

Plaintiffs' Counsel should be compensated for the time reasonably expended between the filing of the *Mukoyama* complaint and the first *Yumori-Kaku* complaint. During this period, Counsel spent time conducting further fact investigation, including monitoring Charter Review Committee and City Council meetings related to the election system; conducting outreach and interviewing additional potential plaintiffs; conducting legal research; drafting discovery requests; communicating with the City on discovery, procedural issues, and offers of settlement; researching and drafting the August 2017 notice letter to conform to a strict interpretation of Elections Code § 10010; opposing the demurrer; and attending case management conferences. Baller Decl. ¶¶ 45-47. These efforts were hours reasonably spent, and they laid the foundation for necessary work that continued after the filing of the *Yumori-Kaku* complaint. Baller Decl. ¶ 48.

In July 2017, as the litigation on the *Mukoyama* complaint was proceeding, the City Council for the first time accepted a recommendation to change its election system and endorsed the Charter Review Committee's recommendation that the City establish two three-member districts, the proposal that eventually became known as "Measure A." Baller Decl. ¶ 51. Plaintiffs' Counsel expanded their fact and legal investigation to address the Measure A proposal, and they informed the City that the proposed system would not cure vote dilution for Asian Americans, and would, to the contrary, perpetuate it. Baller Decl. ¶ 52. Needless to say, the City did not change course.

California precedent confirms that the time expended while the *Mukoyama* complaint was pending is compensable. In *Stockus v. Marsh*, 217 Cal. App. 3d 647 (1990), the Court of Appeal affirmed the award of fees to a successful unlawful detainer plaintiff for time spent on two prior, related complaints in the same matter. *Id.* at 654-56. The defendant had succeeded in quashing service of summons in in the first filed complaint, and the plaintiff voluntarily dismissed the second complaint part-way into the litigation. *Id.* at 650-51. Nonetheless the court held that the fees incurred on the two prior unsuccessful actions, which included time spent on "issue evaluation, discovery, [and] trial preparation," were compensable because they contributed to the plaintiff's eventual success in the third action. *Id.* at 654, 656. The same is true here: Plaintiffs' work on legal research, fact development, and discovery on the *Mukoyama* complaint was fully utilized in the filing and litigation of the *Yumori-Kaku* complaint. Similarly, the case management conferences and negotiations with the City permitted the parties to proceed quickly to the merits in the *Yumori-Kaku* action. *See id.*

Although Plaintiffs were unsuccessful in opposing the demurrer, "fees should not be reduced solely because a litigant did not succeed on all claims or theories." *Hogar Dulce Hogar v. Cmty. Dev. Comm'n of City of Escondido*, 157 Cal. App. 4th 1358, 1369 (2007), as modified (Jan. 10, 2008). The reason for this rule is that

> "it is impossible for an attorney to determine before starting work on a potentially meritorious legal theory whether it will or will not be accepted by a court years later following litigation. It must be remembered that an award of attorneys' fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right. To reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right."

Id. (quoting *Sundance v. Municipal Court*, 192 Cal. App. 3d 268, 273 (1987)). Plaintiffs' Counsel reasonably believed their arguments in opposition to the demurrer were meritorious, including their argument founded on the substantial compliance doctrine, which is well established in election law. Baller Decl. ¶ 46. They also took the protective step of filing the *Yumori-Kaku* complaint, and when the opposition to the demurrer was unsuccessful, Plaintiffs were able to quickly proceed to the merits under the *Yumori-Kaku* complaint. Counsel's opposition to the demurrer was time "reasonably spent" and should be compensated. *See Ketchum*, 24 Cal. 4th at 1133 (citing *Serrano IV*, 32 Cal. 3d at 622).

d. Plaintiffs Should Be Compensated for Time Reasonably Spent Opposing the City's Proposal to Enact a Multimember District System

Plaintiffs' Counsel should be compensated for the time they reasonably devoted to informing the media and community groups about the lawsuit and opposing the City's "Measure A" proposal to amend the Charter to enact multimember districts. Activities like media relations, lobbying, or other political work are compensable under civil rights fee shifting statutes if they "contribute, directly and substantially, to the attainment of [the prevailing party's] litigation goals." *Davis v. City & Cty. of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992). The rationale for this rule is that "[w]here the giving of press conference and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, private attorneys do such work and bill their clients." *Id.* Thus, consistent with the principle of awarding full compensation for work reasonably performed on the case, "[p]revailing civil rights plaintiffs may do the same." *See id.*

Plaintiffs' Counsel's initial media work helped them to identify potential plaintiffs and witnesses. Baller Decl. ¶ 55. These efforts significantly contributed to the factual development of the case and should be compensated. *Davis*, 976 F.2d at 1545; *Montes*, 2015 WL 11120966 at *9 (refusing to deduct time spent doing community outreach to identify potential plaintiffs and witnesses in a voting rights cases).

Subsequently, Plaintiffs' efforts to inform the media, community groups, and voters about the prospect for reform through this action and their opposition to the City's Measure A proposal was instrumental in achieving the timely implementation of single-member districts. Plaintiffs have consistently maintained that "Measure A" violated the CVRA by using multimember districts that

would have continued to dilute the votes of Asian Americans.[5] Preventing Measure A's implementation was one of Plaintiffs' core litigation goals. Plaintiffs challenged the legality of the proposal in all relevant complaints, and sought to prevent it from going before the voters. While Plaintiffs' Counsel were prepared to litigate Measure A in court if it was adopted, doing so would have almost certainly prolonged the litigation, delaying the implementation of district elections beyond November 2018.

In the end, Measure A was defeated by a very close vote. Baller Decl. ¶ 56. Counsel's efforts to inform the media and community groups about the prospect for electoral reform through Plaintiffs' lawsuit, and their time spent opposing the adoption of Measure A, were narrowly focused on achieving Plaintiffs' core litigation goals. In light of Measure A's defeat, it is also clear that Counsel's efforts "contribute[d], directly and substantially," to Plaintiffs' ultimate success in obtaining a timely remedy. *Davis*, 976 F.2d at 1545.

Compensating Plaintiffs' Counsel for this time is well supported by case law. In *Davis*, for example, plaintiffs challenging discriminatory hiring practices used by the San Francisco Fire Department engaged in lobbying and media work in order to obtain the support of the San Francisco Board of Supervisors for a proposed, favorable consent decree. *See* 976 F.2d at 1545. The Ninth Circuit affirmed the award, holding that the time was compensable to the degree it contributed to the plaintiffs' successful resolution of the case through the consent decree. *Id.* (remanding for the district court to reconsider public relations activity conducted after the signing of the consent decree). *See also Pierce v. Cty. of Orange*, 905 F. Supp. 2d 1017, 1028-29 (C.D. Cal. 2012) (awarding fees for media work "directly and intimately related" to the case and which "may well have been one way to pressure the County to change its policies to ameliorate unconstitutional [jail] conditions."); *United*

[5] Both "multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (quotation marks and editing omitted). For that reason multi-member districts may be challenged under the CVRA. Cal. Elec. Code §14026(a)(3). Although the City touted the speculative benefits of Ranked Choice Voting, in the absence of voting equipment that would permit Ranked Choice Voting, implementation of Measure A would have resulted in the election of City Council members through dilutive multimember districts not only in November 2018, but for the foreseeable future. Baller Decl. ¶ 8.

States v. City of San Diego, 18 F. Supp. 2d 1090, 1099-1100 (S.D. Cal. 1998) (awarding fees for lobbying work "done to protect interests that are intimately related to the litigation").

In a case cited by *Davis*—and strikingly comparable on the facts to this case—the Eighth Circuit affirmed the award of fees for counsel's involvement in levy elections intimately connected to a desegregation case. *Jenkins by Agyei v. State of Mo.*, 862 F.2d 677 (8th Cir. 1988) *cited by Davis*, 976 F.2d at 1545. The levy elections sought to raise funds to finance the desegregation remedy ordered by the court, and if successful, would have averted the need for the court to intervene on the funding question. *Id.* at 678. The Eight Circuit affirmed the award because, "[w]hile the work performed involved the election process, it was to further the goals sought in litigation and was related to the conditions for further court intervention enumerated by this court." *Id.* at 679.

Some courts have applied a "but-for" causation requirement, declining to award fees for media or political work that the plaintiffs would have engaged in regardless of the litigation. *See San Diego*, 18 F. Supp. 2d at 1100. Here, counsel's public relations work related to the litigation and to Measure A easily passes the "but-for" test. Measure A was put forward by the City in reaction to—and as an apparent effort to evade—Plaintiffs' CVRA challenge to the City's at-large City Council elections. The City persisted in its flawed Measure A proposal despite notice from Plaintiffs that it would not remedy the CVRA violation, and would in fact perpetuate it. Baller Decl. ¶ 53. Plaintiffs' Counsel reasonably sought to stop the unlawful proposal in its tracks and obtain public support for the alternative path to reform offered by this litigation in order to attain Plaintiffs' goal of the timely implementation of a full single-member district remedy. They would have had no role in the Measure A campaign but for this litigation, and they should be compensated for the time successfully expended in opposing the measure.

e. <u>Counsel's Time Following Entry of Judgment, Including Time Spent Securing An Award of Fees, is Compensable</u>

Plaintiffs' reasonable hours spent on the litigation include a modest amount of time following the Court's entry of judgment on July 26, 2018. These hours were spent monitoring the implementation of the remedial six-district plan, researching post-judgment procedural issues, assuring that pre-election procedures went forward in a timely, accurate manner, conducting preliminary work

on the pending appeal, and preparing this fee motion. Each of these activities are properly included in the lodestar calculation. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558-59 (1986) (advocacy and monitoring to ensure enforcement of relief ordered by the court); *Ketchum*, 24 Cal. 4th at 1133 ("[A]n attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee.").

2. Plaintiffs' Counsel's Hourly Rates Are Reasonable

The rates claimed in a fee application are reasonable if they are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 783 (2007). Courts consider the "prevailing market rates in the relevant community," as well as the "experience, skill, and reputation of the attorney requesting fees." *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 1009 (2013). In complex litigation like voting rights cases, the appropriate market is that governing rates for attorneys engaged in "equally complex" matters. *Hensley v. Eckerhart*, 461 U.S. 424, 430, n.4 (1983); *Williams v. Bd. Of Comm'rs of McIntosh Cnty.*, 938 F. Supp. 852, 858 (S.D. Ga. 1996) ("Voting Rights litigation is, in and of itself, an extremely complex and intimidating area of the law").

Plaintiffs' requested hourly rates are reasonable under these standards. Plaintiffs' Counsel request compensation at their usual billing rates, shown below, for their work in this case:

GBDH Rates		
Attorney	**Graduation Year**	**2018 Rate**
Morris Baller, Of Counsel	1970	$875
Laura Ho, Senior Partner	1994	$860
Anne Bellows, Associate	2013	$450
Ginger Grimes, Associate	2015	$405
Alan Romero, Associate	2016	$375
Reynaldo Fuentes, Law Clerk	--	$295
Scott Grimes, Statistician & Senior Paralegal	--	$300
Stuart Kirkpatrick, Paralegal	--	$250
Rates for Law Offices of Robert Rubin		
Attorney	**Graduation Year**	**2018 Rate**
Robert Rubin, Principal	1978	$975
Mark Fahey, Associate	2013	$615

Asian Law Alliance Rates		
Attorney	**Graduation Year**	**2018 Rate**
Richard Konda, Senior Attorney	1978	$550
Nick Kuwada, Staff Attorney	2009	$375

Plaintiffs' counsel set these rates based on the prevailing local market rates for attorneys of comparable experience, qualification, and skill. Baller Decl. ¶ 114; Rubin Decl. ¶ 29; Konda Decl. ¶ 9. These rates are justified by the qualifications and experience of the attorneys and their respective organizations, as further described in the attorney declarations submitted with this motion. Baller Decl. ¶¶ 121-154; Rubin Decl. ¶¶ 1-2; Konda Decl. ¶ 8. Goldstein, Borgen, Dardarian & Ho ("GBDH"), Robert Rubin, and the Asian Law Alliance each have outstanding reputations for civil rights work based on decades of litigating significant cases, and, in the case of ALA, a record of providing well-respected legal services and advocacy on civil rights issues affecting the Asian American community in Santa Clara. Baller Decl. ¶ 107; Rubin Decl. ¶¶ 11-20; Konda Decl. ¶ 2 and Ex. A. Mr. Baller and Mr. Rubin, the two lead attorneys on the litigation team, are among the elite voting rights lawyers in California. Both have long been intimately involved in important voting rights cases, among other complex civil rights matters.[6] Baller Decl. ¶¶ 108-113, 122-131; Rubin Decl. ¶¶ 11-20. Laura Ho has more than two decades of experience in complex litigation including managing large legal teams working on demanding cases, and prior to this litigation had worked on a number of successful CVRA cases including two that required extensive litigation. Baller Decl. ¶¶ 135-141.

GBDH's hourly rates have been consistently approved by state and federal courts. *See, e.g.*, *Willey v. Techtronic Indus. N. Am.*, No. RG 16806307 (Alameda Cnty. Super. Ct.) (finding that GBDH's "2017 hourly rates are reasonable and commensurate with the prevailing rates for class actions."); *Carrillo-Hueso v. Ply Gem Indus. Inc.*, No. 34-2016-00195734-CU-OE-GDS (Sacramento

[6] The difference in their respective billing rates is attributable in part to the fact that Mr. Baller stepped away from a full-time case load several years ago when he retired from his partnership at GBDH became of counsel to the firm, handling a more limited case load, and has not regularly raised his billing rates since then. Baller Decl. ¶ 138. Additionally, while both Mr Baller and Mr. Rubin are among the state's foremost voting rights litigators, Robert Rubin's expertise in this area of law, and his active advocacy using the CVRA since it first came into effect is unparalleled and supports a higher billing rate.

Cnty. Super. Ct. June 29, 2017) (in final approval order, finding that GBDH's "2017 hourly rates are reasonable and commensurate with the prevailing rates for wage and hour class actions."); *Barnes v. Sprig, Inc.*, No. CGC-15-548154 (S.F. Cnty. Super. Ct. Dec. 20, 2016) (in final approval order, finding "that [GBDH's] 2016 hourly rates are reasonable and commensurate with the prevailing rates for wage and hour class actions"); *Willits v. City of Los Angeles*, No. 2:10-cv-05782-CBM-MRW (C.D. Cal. Aug. 25, 2016) (ECF No. 418) (approving GBDH's 2015 rates); *Mayton, et al. v. Konica Minolta Business Solutions, U.S.A., Inc.*, No. RG12657116 (Alameda Cnty. Super. Ct. June 22, 2015).

Robert Rubin has received his reasonably hourly rate in multiple recent CVRA settlements, including in *Paik v. City of Fullerton*, No. 30-2015-00777673-CU-MC-CJC (Orange Cnty. Super. Ct. 2015) and in the recent settlement with the City of Ventura. Rubin Decl. ¶ 20. His associate Mark Fahey likewise received his hourly rate in the City of Ventura settlement.[7] *Id.*

Counsel's requested rates are also in line with those awarded by the court in the *Palmdale* litigation, the closest comparator to the present litigation. In 2014, the court awarded a $700 hourly rate for Robert Rubin and Morris Baller (who were described as "senior attorneys" in that award decision), $600 per hour for Laura Ho, and $395 per hour for a fourth-year GBDH associate. *Jauregui v. City of Palmdale*, (L.A. Cnty. Super. Ct. June 6, 2014). It is instructive to apply, for comparative purposes, a 5%-10% range of yearly increases in hourly rates, which is consistent with strong rate growth in the regional legal market over the last five years,[8] to the hourly rates used by the court in *Jauregui*, to calculate updated equivalent rates for 2018. Those rates for the "senior" attorneys, Mr. Rubin and Mr. Baller, would be $851 to $1,025 per hour. It is also appropriate to apply the same updated "senior" rates to Ms. Ho consistent with her qualifications, experience level (including the increase in her level of experience and responsibility since 2014), and role in the litigation.[9] The same exercise, applied to the $395 per hour awarded in *Jauregui* to a fourth-year associate, yields a range of

[7] Mark Fahey's rate during the time he was an associate in Rubin's Law Offices was based on and comparable to his billing rate at the corporate law firm where he had worked immediately prior. *See* Rubin Decl. ¶ 30.

[8] *See* Pearl Decl. ¶ 14, fn. 1.

[9] *See* Baller Decl. ¶ 141.

$480 to $578 per hour—similar to or more than the rates requested for law firm associates in Plaintiffs' application.

The fact that courts have previously upheld counsel's hourly rates establishes a presumption that those rates are reasonable, and that they fall within the market range. *See, e.g., United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). While GBDH's rates have increased since the court awards listed above, such rate increases are appropriate to account for inflation, changes in the legal market, and the attorneys' additional years of experience and increase in qualifications and responsibilities. *See Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1122 (C.D. Cal. 2012) ("courts routinely recognize that fee rates increase over time based on a variety of factors."); *Pierce v. Cnty. of Orange*, 905 F. Supp. 2d 1017, 1038 (C.D. Cal. 2012).

The sworn declarations of knowledgeable counsel who practice in the relevant market constitute probative evidence supporting a fee applicant's hourly rates. *Heritage Pac. Fin.*, 215 Cal. App. 4th at 1009-10. In this case, Plaintiffs' Counsel have submitted a declaration by the *most* knowledgeable such counsel: California attorneys' fee expert Richard Pearl, the author of the treatise California Attorney Fee Awards and a preeminent practitioner in the field of fee awards, supporting their requested rates. Pearl attests, based on his extensive research, that Plaintiffs' Counsel's rates are in line with prevailing and approved rates in both state and federal courts in the San Francisco Bay Area, and that Counsel's rates are well within the range of market rates for attorneys of comparable skill, experience, and reputation in the San Francisco Bay Area market. Pearl Decl. ¶ 14. The bases for his opinion include evidence of rates found reasonable in other cases, rate information from several credible surveys, and an independent survey of rates charged by other law firms that handle complex litigation and have offices or regularly practice in the San Francisco Bay Area. Pearl Decl. ¶¶ 15-38.

In addition, Morrison & Foerster partner Michael Jacobs, who is a former Managing Partner at that firm, attests in that based on his knowledge of billing rates and his past work with Robert Rubin, Morrison and Foerster's "billing rate for an attorney of Mr. Rubin's caliber and experience would be at least $975 per hour and likely more." Jacobs Decl. ¶ 10.

Table 3, below, shows the ranges of attorney rates provided in paragraphs 16-36 and 38 of Mr. Pearl's declaration compared to those of Plaintiffs' counsel, establishing that Plaintiffs' counsel's rates are well within those market ranges, and in many cases on the lower end of the range.[10]

	Partner / 20+ years		Senior Associate / 5-8 years		Junior Associate / 1-4 years	
	Pearl Decl.	Pls.	Pearl Decl.	Pls.	Pearl Decl.	Pls.
Billing rates	$675-$1,175	$550-$975	$320-$965	$450-$615	$350-$810	$375-$405
Court awards	$591-$1,200	"	$325-$710	"	$265-$640	"

Based on Plaintiffs' evidentiary showing, the Court should find that Counsel's requested rates are reasonable and should use them in calculating the fee award.

3. A Multiplier to Enhance the Requested Lodestar is Necessary to Fully Compensate Plaintiffs' Counsel

After the Court determines the lodestar, which represents "the basic fee for comparable legal services in the community," the Court should consider further adjustment "to fix the fee at the fair market value for the particular action." *Ketchum*, 24 Cal. 4th at 1132. As the California Supreme Court has explained, this step requires a retrospective determination of "whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." *Id.* Multipliers "from 2 to 4, or even higher," may be appropriate. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 (2008) (affirming multiplier of 2.5); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78, 82-83 (1988) (affirming multiplier of 2.34); *Ridgeway v. Wal-Mart Stores, Inc.*, 269 F. Supp. 3d 975, 995-99 (N.D. Cal. 2017) (applying California law) (awarding 2.0 multiplier based on "contingent risk, the novelty, difficulty and complexity of the litigation, and the preclusion of other employment").

Several factors strongly support an enhancement in this case, including (1) the novel and

[10] The rates sought here for litigation support staff ($250-$300) are also well within the range documented by Mr. Pearl. Pearl Decl. ¶¶ 15-38.

complex nature of the case; (2) the extraordinary skill demonstrated by Plaintiffs' Counsel; (3) the significant contingency risk assumed by Counsel in accepting the representation; (4) the preclusion of other employment that resulted from the intensive work required by this case; and (5) the exceptional results achieved and the importance of the rights at stake. *See Ketchum*, 24 Cal. 4th at 1132; *Graham*, 34 Cal. 4th at 582; *Harman*, 136 Cal. App. 4th at 1316. In light of these factors, Plaintiffs respectfully suggest that an enhancement factor (or "multiplier") of 1.8 would appropriately compensate Counsel.

a. <u>This Case Posed Extraordinary Challenges Which Were Skillfully Handled by Plaintiffs' Counsel</u>

The "novelty and difficulty" of complex issues raised in a case weighs in favor of an enhancement to the lodestar. *Ketchum*, 24 Cal. 4th at 1132; *Pellegrino v. Robert Half Int'l, Inc.*, 182 Cal. App. 4th 278, 290-92 (2010) (holding complex and novel issues supported a 1.75 multiplier); *Ridgeway*, 269 F. Supp. 3d at 997-99 (complex and novel issues were a factor in support of 2.0 multiplier). A related factor, "extraordinary skill" in presenting novel or complex issues, may also support an enhancement to the extent it is not already captured in counsel's reasonable hourly rates. *Ketchum*, 24 Cal. 4th at 1132, 1138-39. Given the demonstrated skill of Plaintiffs' Counsel in handling the many thorny challenges presented by this case, both factors support an enhancement here.

As the Court itself noted during the proceedings, this case was marked by multiple novel and complex issues at both the merits and remedies stages. At the opening of the liability phase trial, the Court commented that the litigation raised "some really important issues and issues that, being applied to the City of Santa Clara, raise some—I think some novel issues that we're all going to have to figure out together," and observed that the case would be challenging for the Court, and "very challenging for the lawyers." Liability Phase Tr. Day 1, 5:17-6:7. While the Court is in "the best position to judge the value of plaintiffs' counsel's services rendered" in these circumstances, Plaintiffs respectfully submit that the Court's prediction about the difficult issues proved correct, and that Plaintiffs' Counsel demonstrated extraordinary skill in presenting and resolving those issues. *See Pellegrino*, 182 Cal. App. 4th at 292.

The Court was not alone in predicting that this case would present challenging and complex issues far afield from the well-trodden territory typical of other voting rights cases. Academic

commentators have highlighted the obstacles confronting Asian American voting rights plaintiffs seeking to invoke laws that were designed "to address a specific group (African Americans), a specific dyadic relation (blacks and whites), and a specific set of historical and ongoing practices" relevant to the sordid history of efforts to suppress African American votes. Chen & Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. Irvine L. Rev. 359, 376 (2013). Some of the specific hurdles identified by Chen and Lee, and others, include (1) the difficulty of demonstrating and describing political cohesion among the internally diverse Asian American community; (2) the limited and sometimes flawed data available regarding Asian American political conduct (with Dr. Ramakrishnan's National Asian American Survey noted as an exception); and (3) the challenge of squaring the particular barriers to political participation experienced by Asian American voters with a body of case law focused on practices and socioeconomic factors derived from the African American experience. *Id.* at 376, 385, 390. Plaintiffs were undeterred by these difficulties and ultimately prevailed. This achievement is remarkable—few if any previous cases have successfully overcome these significant challenges to establishing an Asian American voting rights claim at trial.

Another source of complexity was found in the demographic patterns in Santa Clara—relatively low levels of segregation, significant internal diversity within the Asian American community, and the existence of multiple minority groups rather than a simple division between the majority and the minority—which raised a host of difficult legal and evidentiary issues. Plaintiffs' counsel more than rose to the challenge of shepherding the case through complex statistical disputes, deftly navigating treacherous territory that the Federal Judicial Center's Reference Manual on Scientific Evidence identifies as an area of frequent misunderstanding and error by lawyers and even courts. Federal Judicial Center, *Reference Manual on Scientific Evidence*, 271 n.138, 577 n.81 (3d ed. 2011). Plaintiffs also established, as a matter of first impression in interpreting Elections Code § 14026(e), the propriety of separating out each significant racial group of voters in the analysis of racially polarized voting, rather than conducting a simpler "bivariate" analysis that would have obscured differences in voting between the white majority and other racial minority groups in the community. Baller Decl. ¶ 24; Statement of Decision 12-13. And although defense counsel repeatedly

told the Court that it would be impossible to draw an adequate district map in a City so diverse, Plaintiffs presented the Court with a nuanced analysis of remedial districts under voting rights law, and ultimately at the remedies phase the Court was able to select among several proposed single-member district plans containing Asian American majority and plurality districts. Baller Decl. ¶ 23.

In addition to its substantive complexities, this litigation raised novel procedural questions about the interplay of political and legal processes in crafting remedies under the California Voting Rights Act and Elections Code § 10010(a). In the face of the City's initial intransigence and refusal to call the public hearings required by § 10010(a),[11] Plaintiffs and the Court resorted to extraordinary flexibility in scheduling and rescheduling the remedies hearing on short notice and engaging the County Registrar in exemplary efforts to facilitate the November 2018 election on extremely short notice; and they succeeded in both accommodating the public involvement prioritized by the statute and achieving the implementation of a remedy in time for the November 2018 elections.

In short, there can be little debate that this was a difficult, complex case presenting numerous novel issues. Plaintiffs' success at every turn, despite these challenges, is evidence of the considerable skill counsel brought to the representation.

The Court can determine that these aspects of the litigation support a multiplier without double-counting factors already subsumed in the lodestar, consistent with the requirements of *Ketchum*, 24 Cal. 4th at 1138-39. There are several reasons the lodestar fails to fully capture the difficulty of this particular case and the skill required to litigate it successfully. First, Counsel's hourly rates are uniform across each organization's fee-bearing dockets, applicable to routine as well as novel or complex cases like this one. Baller Decl. ¶ 27; Rubin Decl. ¶ 29; Konda Decl. ¶ 8. Additionally, the compressed timeline of the case required a superlative degree of commitment and efficiency in

[11] As the Court pointed out in its June 26, 2018 scheduling order for the remedies phase, the City "did not provide constructive suggestions" on how the public hearings required by § 10010 could be resolved. Order Re: Schedule for the Remedies Phase of Trial at 3, June 26, 2018. Rather, "instead of making best efforts to ensure that the November 2018 elections comply with the California Voting Rights Act, the City submitted comments that described how the City might bring those efforts to a halt." *Id.*

meeting the case's requirements, and in Counsel's professional judgment the hours claimed understate the intensity and effectiveness of the legal team's work. Baller Decl. ¶ 27.[12]

The market for legal services recognizes and rewards attorney work that meets more than ordinary demands by payment of enhancements above ordinary hourly billing rates. Pearl Decl. ¶ 43. An enhancement of the lodestar on these grounds is therefore appropriate to "fix a fee at the fair market value" for this particular case. *Ketchum*, 24 Cal. 4th at 1132; *Pellegrino, Inc.*, 182 Cal. App. 4th at 290-92; *Ridgeway*, 269 F. Supp. 3d at 997-99.

b. A Multiplier Is Necessary to Compensate Counsel for Assuming Significant Risk in Accepting and Litigating this Case

Application of a multiplier to counsel's hourly rates for the hours spent successfully developing and prosecuting Plaintiffs' claim is also appropriate to compensate Plaintiffs for the significant contingency risk assumed by their counsel in pursuing this litigation.[13] A multiplier "reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes *earned compensation*," not a windfall. *Ketchum*, 24 Cal. 4th at 1138 (emphasis added). Such an enhancement "is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." *Id.*; *see also id.* at 1136 ("'The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk.'") (quoting Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 324–325 (1977)); Pearl Decl. ¶ 45.

Plaintiffs' Counsel took on a huge contingent risk here. To date, Plaintiffs' Counsel have expended thousands of hours of attorney time and more than $200,000 in out-of-pocket costs, all as-yet

[12] From the filing of the operative complaint to the entry of judgment, the case was fully litigated at every stage, including two trials, in less than nine months. The speed with which counsel had to do their work—including conducting research on many complicated and, in some cases, novel issues; briefing legal issues; identifying, preparing, and presenting testimony of expert witnesses; and responding to frequently changing legal and political circumstances—greatly increased the challenges of what would have been difficult litigation even if it had proceeded at a more normal pace.

[13] Plaintiffs have chosen not to request enhancement of their lodestar fees for work seeking fees and costs.

uncompensated, without any certainty of receiving payment. Baller Decl. ¶ 28. The difficulty and complexity of this novel voting rights case, as outlined above, magnified the risk accepted by Plaintiffs' counsel, as did the City's determination to litigate every aspect of the case without compromise. *See, e.g.*, *Ridgeway*, 269 F. Supp. 3d at 996-97 (finding "significant" contingent risk where the defendant "vigorously defended" the case at every stage, plaintiffs took the case to trial, and contemporaneous legal developments posed increased risk to plaintiffs' claim); *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1217 (2008) ("The claims and defenses in this case raised a significant number of complex legal issues of first impression, and class counsel took a substantial risk that it would not prevail on these issues and thus would not recover a full fee."). Plaintiffs' Counsel accepted the representation, and unstintingly litigated the claims, even after other skilled attorneys backed by the resources of a large corporate law firm declined the case as too risky and complex. Rubin Decl. ¶ 25. Nor has the risk yet completely abated: the City is pursuing an appeal, even as it simultaneously implements the Court's remedial order.

The California Supreme Court directs that in weighing a risk-based adjustment to the lodestar, a court should "consider the degree to which the relevant market compensates for contingency risk." *Ketchum*, 24 Cal. 4th at 1138. Pearl provides his professional opinion that the contingency risk assumed by Counsel in this case is a significant factor weighing strongly in support of the requested multiplier, consistent with the premium awarded for contingency risk in the private legal marketplace. Pearl Decl. ¶ 43.

Pearl's opinion is corroborated by recent attorneys' fee awards in the San Francisco Bay Area that include substantial multipliers based, in whole or in part, on contingency risk. *See, e.g.*, *Taylor v. Nabors Drilling USA, LP*, 222 Cal. App. 4th 1228, 1252 (Ct. App. 6th Dist. 2014) (continency risk and deferral in payment alone supported multiplier of 1.4 to 1.5); *Ridgeway*, 269 F. Supp. 3d at 996-97 (N.D. Cal. 2017) (contingency risk was among factors supporting 2.0 multiplier); *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161, at *10 (N.D. Cal. June 5, 2017) (San Jose Division) (awarding 2.0 multiplier because, among other reasons, counsel "assumed a risk of nonpayment while litigating this case for over two years); *Nat'l Fed'n of Blind of Cal. v. Uber Techs., Inc.*, No. 14-CV-04086 NC, 2016 WL 10920461, at *2 (N.D. Cal. Dec. 6, 2016) (risk

associated with novel issues among factors supporting 1.5 multiplier, noting that 1.65 multiplier had been awarded in comparable case that involved a greater amount of litigation); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *7 (N.D. Cal. May 21, 2015) (risk alone supported multiplier of 2.0, despite other factors weighing against multiplier). Outside this region, in a case that presents highly similar circumstances relevant to the attorneys' fees issues, the Los Angeles Superior Court in *Jauregui v. Palmdale* awarded plaintiffs' counsel (including two of the firms and several of the individual attorneys representing Plaintiffs here) a multiplier of 1.5 on hourly rates for virtually all of their time. Baller Decl. ¶ 119.

"A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions." *Ketchum*, 24 Cal. 4th at 1133 (quotation marks and internal citation omitted). The particular facts of this case, Pearl's expert opinion regarding increased market compensation for risk, and recent attorneys' fee awards in the region all support awarding a meaningful enhancement on these grounds.

c. <u>The Litigation Precluded Counsel From Accepting Other Income-Generating Work</u>

A multiplier is appropriate to account for the reality that this litigation precluded plaintiffs' counsel from accepting other employment that they would have pursued in its absence. *Ketchum*, 24 Cal. 4th at 1132. For each of the organizations representing Plaintiffs, the time-intensive nature of this case absorbed significant staff time and resources, as described in more detail in the accompanying declarations. Baller Decl. ¶¶ 31-33; Rubin Decl. ¶¶ 26-27; Konda Decl. ¶ 11. Due to the resources required to litigate this case, all three organizations turned away other prospective income-generating work during the course of the litigation and shouldered the burden of reduced resources for their existing work. *Ids.* This factor further supports Plaintiffs' requested multiplier. *Ketchum*, 24 Cal. 4th at 1132; *Ridgeway*, 269 F. Supp. 3d at 998 (the preclusion of other employment among factors supporting 2.0 multiplier).

d. <u>This Case Vindicated Important Constitutional Rights and Conferred a Meaningful Benefit on the Voters of Santa Clara</u>

A final factor weighing in favor of the requested multiplier is the degree of success achieved by

Plaintiffs in vindicating the voting rights not only of the five individual plaintiffs, but of all Asian American voters in Santa Clara. *Graham*, 34 Cal. 4th at 582 ("The 'results obtained' factor can properly be used to enhance a lodestar calculation where an exceptional effort produced an exceptional benefit."). In assessing whether to award a multiplier based on the degree of success achieved in a civil rights case, courts consider the importance of the rights at stake and whether the litigation conferred a benefit on the public. *Harman*, 136 Cal. App. 4th at 1316; *Bravo v. City of Santa Maria*, 810 F.3d 659, 666 (9th Cir. 2016); *see also Edgerton v. State Pers. Bd.*, 83 Cal. App. 4th 1350, 1363 (2000) (affirming award of multiplier based in part on "the importance of the privacy rights that were vindicated by the [i]njunction"); *Coal for L.A. Cnty. Planning etc. Interest v. Bd. of Supervisors*, 76 Cal. App. 3d 241, 251 (1977) (affirming a 2.0 multiplier in part based on "the importance of the suit, and the public nature of plaintiffs' position").

This case brought about a momentous transformation of Santa Clara's electoral system, ending the numbered-seat at-large election of City Council members that had long resulted in the dilution of Asian American votes. Moreover, Plaintiffs successfully opposed the various multi-member district plans proposed by the City and achieved their goal of a single-member district remedy. Baller Decl. ¶ 36. The regularly scheduled City Council elections, which are less than a month away, are now moving forward under a single-member district plan, as sought by the Plaintiffs and ordered by the Court. Baller Decl. ¶ 34.

The rights vindicated in this lawsuit are of constitutional magnitude. *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781, 800 (2014) (the CVRA protects the constitutional right to vote and equal protection); *see also Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise"). Significantly, Plaintiffs achieved the implementation of a single-member district plan in time for the upcoming City Council elections to go forward without disruption, putting an immediate end to the disenfranchisement of Asian American voters.[14] The benefit to the

[14] There is also good reason to believe, from the historical absence of Latino City Council members, that the City's election system compromised Latinos' voting rights as well as Asians'. The remedial plan ordered by the Court enhances the numerical influence of Latino voters in at least one of the six districts, enhancing Latino voters' effective voting strength and influence. Thus, the benefit to

public, and particularly to the large number of Asian American voters in Santa Clara, should not be understated. After all, "the right of qualified voters . . . to cast their votes effectively" is one that "rank[s] among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). Indeed, all Santa Clara residents benefited from this litigation because the violation of the right to vote "strike[s] at the heart of representative government," gravely damaging its legitimacy. *Reynolds*, 377 U.S. at 555. The continued violation of this foundational right in even one more election would have constituted a serious harm to democratic government in Santa Clara.

In view of the grave importance of the rights at stake and the public benefit conferred, Counsel's unalloyed success in quickly and effectively enforcing the rights of Santa Clara voters weighs in support of further enhancement to the lodestar. *See Graham*, 34 Cal. 4th at 582; *Bravo*, 810 F.3d at 666.

C. Plaintiffs Are Entitled to Recover Expert Fees Incurred in Connection with this Motion

Plaintiffs also seek to recover the expert fees of Richard Pearl incurred in connection with preparing this motion, for a total of $8,712.50. As prevailing parties, Plaintiffs are entitled to recover "litigation expenses including, but not limited to, expert witnesses fees and expenses." Elec. Code § 14030. Expert costs incurred in seeking fees are compensable litigation costs in civil rights cases and were reasonably incurred here. *See, e.g., United States v. City & Cnty. of San Francisco*, 748 F. Supp. 1416, 1439-41 (N.D. Cal. 1990), *aff'd in part and rev'd in part sub nom Davis v. City & County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), *modified on other grounds* 984 F.2d 345 (9th Cir. 1993).

III. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court enter an interim order awarding Plaintiffs attorneys' fees of $4,084,612.83 and $8,712.50 in expenses and costs for the work set forth in the declarations of Richard Konda, Morris J. Baller, and Robert Rubin. Plaintiffs will supplement these figures before the hearing to account for additional time, expenses, and costs that they will have incurred and not covered by those declarations.

protected group civil rights achieved by Plaintiffs in this case extends beyond overcoming the dilution of Asian Americans' voting rights.

Dated: October 10, 2018

Respectfully submitted,

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