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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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12 LADONNA YUMORI KAKU, WESLEY
13 KAZUO MUKOYAMA, UMAR KAMAL,
14 MICHAEL KAKU, and HERMINIO
15 HERNANDO,

16 Plaintiffs,

17 vs.

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

19 Defendants.

Case No. 2017-1-CV-319862

ORDER RE: MOTION TO TAX COSTS

20 The above-entitled matter came on regularly for hearing on Friday, January 4, 2019, at
21 9:00 a.m. in Department 5 (Complex Civil Litigation), the Honorable Thomas E. Kuhnle
22 presiding. Having reviewed and considered the written submissions of the parties, and having
23 listened carefully to arguments of counsel, the Court rules as follows:

24 **I. INTRODUCTION**

25 Plaintiffs in this case alleged that defendant City of Santa Clara's ("City") at-large
26 method of election violated the California Voting Rights Act ("CVRA"). This action was tried
27 in two phases – liability and remedies. In the liability phase of trial, the Court found Plaintiffs
28 proved by a preponderance of the evidence that the at-large method of election used by the City

1 impaired the ability of Asians to elect candidates as a result of the dilution and abridgment of
2 their voting rights. In the remedies phase, the Court ordered that six city council members be
3 elected in district-based elections, and the mayor be elected in an at-large election. The Court
4 also ordered that Plaintiffs are entitled to recover attorneys' fees and costs as permitted under
5 law. City now moves to tax costs.¹

6 **II. DISCUSSION**

7 Plaintiffs' Memorandum of Costs lists \$196,583.89 in total costs. City's motion to tax
8 costs requests the Court tax \$65,932.44 of those costs because they were not necessary to the
9 litigation and were merely convenient costs. City cites to Code of Civil Procedure section
10 1033.5, subdivisions (b) and (c), which state "[a]llowable costs shall be reasonably necessary to
11 the conduct of the litigation rather than merely convenient or beneficial to its preparation" and
12 "[a]llowable costs shall be reasonable in amount." City acknowledges that Elections Code
13 section 14030, which applies in this case, also provides that the prevailing party is entitled to
14 "litigation expenses including, but not limited to, expert witness fees and expenses as part of the
15 costs." Plaintiffs take the position that section 14030 allows certain costs that are not allowed
16 under Code of Civil Procedure section 1033.5.

17 City challenges the following costs: (1) costs incurred prior to November 30, 2017, the
18 date on which Plaintiffs filed the original complaint in this action; (2) deposition transcript costs;
19 (3) meals; (4) trial exhibits, binders, and tabs; (5) court reporter fees; (6) travel expenses;
20 (7) legal research costs; (8) unsubstantiated expert witness expenses and expert travel expenses;
21 (9) expert fees for Justin Levitt. These cost categories are discussed below.

22 **A. Costs Incurred Prior to this Case**

23 On March 30, 2017, Plaintiffs' counsel filed *Mukoyama v. City of Santa Clara*, Case No.
24 2017-1-CV-308056 (the "*Mukoyama* action"). In it, Plaintiffs alleged City violated the CVRA.
25 Before the *Mukoyama* action was filed, Plaintiffs' counsel consulted with Dr. J. Morgan
26 Kousser. (Declaration of Morris J. Baller in Support of Plaintiffs' Opposition to Defendant's
27 Motion to Tax Costs ("Baller Decl."), ¶¶ 7-8.) On December 1, 2017, the Court sustained,

28 ¹ Plaintiffs' motion for attorneys' fees is addressed by the Court in a separate ruling.

1 without leave to amend, a demurrer to the First Amended Complaint in that action. Just one day
2 before the Court sustained the demurrer in the *Mukoyama* action, this action was filed. The
3 complaint filed in this action is virtually identical to the complaint filed in the *Mukoyama* action.
4 The factual allegations, legal claims, and requested relief are the same.

5 City argues Plaintiffs cannot recover costs incurred prior to the date on which Plaintiffs
6 filed the original complaint in this action. City asserts those costs relate only to the previously
7 filed *Mukoyama* action.

8 Plaintiffs contend the costs incurred prior to the filing of this action were necessary to
9 advance the case and are recoverable. They rely on *Stokus v. Marsh*, in which the court stated
10 “pre-complaint investigation and evaluation of the potential claim is part of the process and
11 expense of litigation.” (217 Cal.App.3d 647, 656, quoting *First Nat. Bank of Arizona v.*
12 *Continental Bank* (1983) 673 P.2d 938, 944.) The court explained:

13 Moreover, pre-filing fees are particularly warranted here because the dismissal and
14 re-filing were designed to avoid unnecessary litigation as to whether notice of
15 eviction was technically defective. Substantial trial preparation had occurred at
16 that point. Discovery conducted in the dismissed case was fully utilized in the
17 refiled action. Precluding fees for this work would not only foreclose
18 compensation for necessary legal services but might discourage a party from
19 voluntarily dismissing an earlier complaint, though it would otherwise be
20 economical to do so.

21 (*Stokus v. Marsh, supra*, 217 Cal.App.3d at p. 656.)

22 Plaintiffs assert the initial research conducted by Dr. Kousser “provided a foundation for
23 the work that he continued to do leading up to and after the filing of the Yumori-Kaku
24 complaint” and “[u]ltimately this work was used in his preparation of his report and testimony
25 during the liability phase of trial.” (Baller Decl., ¶ 8.) Consequently, as was the case in *Stokus*,
26 Dr. Kousser’s work “was fully utilized in the refiled action” and can be recovered. This is not
27 the case for the legal research and travel costs. Unlike *Stokus*, Plaintiffs did not voluntarily
28 dismiss the complaint in the *Mukoyama* action. Indeed, Plaintiffs lost. While Dr. Kousser’s
pre-filing work was helpful for advancing Plaintiffs’ position in both cases, the legal research
and travel were not. The Court will strike those costs, which total \$1,850.61.

1 **B. Deposition Transcripts**

2 City seeks to have \$10,814.15 in deposition transcript costs struck.² City argues
3 Plaintiffs have not justified the necessity of each of these depositions with declarations. City
4 also argues it was not necessary to conduct depositions for Lisa Gillmor and Dominic Caserta,
5 who were lay witnesses who did not testify at trial. In addition, City points out Jeanne Gobalet
6 was deposed twice, once as a lay witness for the liabilities phase of trial and once as an expert for
7 the remedies phase. City contends Gobalet's testimony as a lay witness was not helpful.

8 In response, Plaintiffs assert Gillmor and Caserta were both elected officers of City at the
9 time they were deposed and they had valuable information on a number of issues relevant to
10 Plaintiffs' case. (Baller Decl., ¶ 18.) Plaintiffs state Gobalet was an important fact witness
11 regarding City's awareness of evidence of racially polarized voting in its elections dating as far
12 back as 2011. (*Id.* at ¶¶ 19-20.)

13 Costs for taking, video recording, and transcribing necessary depositions are allowable.
14 (Code Civ. Proc., § 1033.5, subd. (a)(3)(A).) The Court finds the costs for these depositions
15 were reasonable because each of these individuals had or could have had relevant information.

16 In the opposition papers, however, Plaintiffs state their actual deposition costs were
17 greater than the amount originally requested; Plaintiffs now request \$11,138.54. The Court will
18 not allow the recovery of costs not listed in the Memorandum of Costs. Plaintiffs have not
19 attempted to amend the Memorandum of Costs and City had no notice at the time it filed its
20 motion to tax costs that there were additional costs at issue. Consequently, the Court will allow
21 recovery of \$9600.86 in deposition costs.³

22 **C. Meals**

23 City requests that \$962.45 in costs for attorney and expert meals during trial be struck.
24 California law provides that meals are allowable as costs in the Court's discretion. (Code Civ.
25 Proc., § 1033.5, subd. (c)(4).) Plaintiffs argue the meals during trial were reasonably necessary
26 because their attorneys had to travel more than an hour's drive from their offices in San

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28 ² City states the total amount listed in the Memorandum of Costs was not properly calculated and actually adds up to \$9,600.83. However, City seeks to strike the entire requested amount of \$10,814.15.

³ The listed amounts add up to \$9600.86, not the \$10,814.15 stated in the total on the Memorandum of Costs.

1 Francisco and Oakland to trial in San Jose. While this is not a tremendous distance to travel, the
2 Court nevertheless finds these costs are reasonable because the attorneys did need to travel to,
3 and participate in, trial. These costs are allowed.

4 **D. Trial Exhibits, Binders, and Tabs**

5 City states Plaintiffs seek \$530.06 in trial exhibits and \$63.12 in exhibit binders and tabs,
6 totaling \$594.38.⁴ Costs for trial exhibits are allowed “if they were reasonably helpful to aid the
7 trier of fact.” (Code Civ. Proc., § 1033.5, subd. (a)(13).) City contends Plaintiffs have not
8 demonstrated the exhibits were reasonably helpful. Plaintiffs argue all of their trial exhibits,
9 except one, were admitted into evidence and that it is helpful to aid the trier of facts for counsel
10 for both parties to have ready access to the exhibits used during trial.

11 The Court finds the availability of the exhibits was helpful and the costs should be
12 allowed. However, the allowable costs are limited to the total of \$593.18.

13 **E. Court Reporter Fees**

14 Plaintiffs seek \$9,718 in court reporter fees. City points out that court reporter fees are
15 only allowed as provided by statute. (Code Civ. Proc., § 1033.5, subd. (a)(11).) City contends
16 there is no statutory provision providing for recovery of court reporter fees in CVRA cases, so
17 the costs should be struck. Plaintiffs respond that the language “as established by statute” is
18 referring to the court reporter fees charged to the parties under statutory authorization. (See, e.g.,
19 Gov. Code § 68086, subd. (a)(2) [“For each proceeding lasting more than one hour, a fee equal
20 to the actual cost of providing that service shall be charged per one-half day of services to the
21 parties. . . .”].) The Court agrees with Plaintiffs’ position that fees for court reporter services are
22 recoverable.

23 City appears to clarify in the reply papers that it is not challenging fees for court reporter
24 appearances, but instead, only the fees for transcripts. These fees total approximately \$5651.42.⁵
25 (See Baller Decl., Ex. C.) Plaintiffs concede these fees are not recoverable under Code of Civil
26 Procedure section 1033.5, but contend they can be recovered pursuant to Elections Code section

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28 ⁴ The amounts for trial exhibits and for exhibit binders and tabs actually add up to \$593.18.

⁵ City does not challenge transcription fees for June 20, 2018, and July 2, 2018, for which the appearance and transcription fees were combined.

1 14030 as “litigation expenses.” In response to Plaintiffs’ reliance on Elections Code section
2 14030, City cites to *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 691, which
3 states: “Where a statute authorizes an award of fees and costs, but is silent as to which costs are
4 to be awarded, Code of Civil Procedure section 1033.5 provides the courts with guidance as to
5 those costs that may or may not be recovered in a civil action.” Section 14030 authorizes
6 recovery for a prevailing plaintiff of “litigation expenses including, but not limited to, expert
7 witness fees and expenses as part of the costs.” Therefore, other than expert witness fees and
8 expenses, the “litigation expenses” recoverable under section 14030 are governed by Code of
9 Civil Procedure section 1033.5. Code of Civil Procedure section 1033.5, subdivision (b)(5),
10 prohibits the recovery of fees for transcripts of court proceedings not ordered by the court.
11 Therefore, the Court will strike transcript costs in the amount of \$5651.42.

12 **F. Travel Expenses**

13 Plaintiffs seek \$7,292.64 in travel and related costs, including \$5,863.49 in hotel costs for
14 expert witnesses and attorneys, and \$1,429.15 in parking costs, cab and rideshare fares, public
15 transportation, and mileage for attorneys to attend case management conferences, court hearings,
16 and trials. City argues the only travel expenses authorized by statute are those to attend
17 depositions. (Code Civ. Proc., § 1033.5, subd. (a)(3)(C).)

18 Aside from travel expenses to attend depositions, Plaintiffs seek to recover mileage,
19 parking, taxis, public transit fees, and hotel costs. (Baller Decl., ¶ 38.) The travel costs include
20 expenses not just for trial, but also to attend case management conferences. (See Memorandum
21 of Costs, Attachment 16.) With regard to the non-deposition expenses, the Court has discretion
22 to award those costs. (Code Civ. Proc., § 1033.5, subd. (c)(4).) Plaintiffs provide evidence they
23 took reasonable steps to limit travel expenses. (Baller Decl., ¶ 39.) The Court will allow these
24 costs.

25 **G. Legal Research Costs**

26 Plaintiffs request \$14,041.00 in legal research costs for use of Westlaw and PACER.
27 Plaintiffs also seek \$45.00 for use of Access Data Group, Inc. Plaintiffs contend these costs can
28 be recovered pursuant to Code of Civil Procedure section 1021.5 as attorneys’ fees and also that

1 there is a growing consensus in federal courts that these costs are recoverable. The Court
2 disagrees. First, Plaintiffs are seeking to recover these expenses here as costs, not fees. Second,
3 while federal authority can be persuasive, California authority is binding and takes precedence
4 here, and California law provides that fees for legal research are not recoverable under Code of
5 Civil Procedure section 1033.5. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th
6 761, 776.) Alternatively, Plaintiffs argue these costs are recoverable pursuant to Elections Code
7 section 14030 as “litigation expenses.” But as discussed previously, other than expert witness
8 fees and expenses, the “litigation expenses” recoverable under section 14030 are governed by
9 Code of Civil procedure section 1033.5.

10 There is no basis for Plaintiffs to recover the requested legal research costs. The Court
11 will strike these costs in the amount of \$14,086.00.

12 **H. Expert Witness Expenses and Expert Travel Expenses**

13 Plaintiffs seek \$1,031.95 in expert witness expenses and \$1,770.34 in expert travel
14 expenses. Expert witness fees are recoverable under Elections Code section 14030, but City
15 argues such fees and expenses must still be reasonably necessary to the conduct of the litigation
16 rather than merely convenient or beneficial to its preparation (Code Civ. Proc., § 1033.5,
17 subdivision (c)(2)) and Plaintiffs have not established these were reasonably necessary expenses.
18 City also argues that some of the travel expenses are for Justin Levitt who was not disclosed as
19 an expert.

20 Plaintiffs provide evidence supporting these expenses with the opposition papers.
21 (Baller Decl., ¶ 44 and Ex. D.) City appears to acknowledge this in the reply papers, but contend
22 Plaintiffs’ expert Dr. Kousser incurred travel expenses for two roundtrip flights over a four-day
23 period which is unreasonable. Dr. Kousser had one flight to San Jose on April 22. He returned
24 to Burbank on April 24. Dr. Kousser had a second flight to San Jose on April 25. He returned to
25 Burbank on April 26. (Baller Decl., Ex. D.) It is not apparent why Dr. Kousser would need two
26 separate round trip flights in this short period of time. This is not a reasonable expense and City
27 should not be required to pay double for Dr. Kousser’s travel. The Court will strike the cost of
28 the second round trip flight, which is \$445.96.

1 **I. Expert Fees for Justin Levitt**

2 Plaintiffs seek \$11,850.00 in expert witness fees for Justin Levitt. City argues those fees
3 are only allowable if they were reasonably necessary to conduct the litigation and reasonable in
4 amount. Plaintiffs provide evidence regarding Levitt's anticipated role as a rebuttal expert
5 witness with regard to multimember district maps, but note the City's ultimate focus on a
6 different plan made his rebuttal testimony unnecessary. (Baller Decl., ¶¶ 45-48.) The Court
7 finds the costs incurred for Levitt to be reasonable because Plaintiffs could not have anticipated
8 with certainty that Levitt's testimony would be unnecessary. These costs are allowed.

9 **J. Costs Requested for the First Time on Reply**

10 In the reply papers, Plaintiffs add some additional costs they state were inadvertently
11 omitted from the Memorandum of Costs. As stated previously, the Court will not allow the
12 recovery of costs not listed in the Memorandum of Costs.

13 **III. CONCLUSION**

14 The motion is GRANTED IN PART and DENIED IN PART. As noted above, Plaintiffs'
15 Memorandum of Costs lists \$196,583.89 in total costs. City's motion to tax costs requests the
16 Court tax \$65,932.44 of those costs. The Court GRANTS City's motion with respect to
17 \$22,033.99 of the costs it seeks to tax. The Court DENIES City's motion with respect to the
18 other costs it seeks to tax.

19
20 Dated: January 7, 2019



Thomas E. Kuhnle
Judge of the Superior Court