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12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA**

14

15 MHC FINANCING LIMITED PARTNERSHIP, an Illinois limited partnership;
16 and GRAPELAND VISTAS, INC., an Illinois corporation,
17
18 Plaintiffs,
v.
19
CITY OF SAN RAFAEL,
20
Defendant,
21

22 ____

23 CONTEMPO MARIN HOMEOWNERS ASSOCIATION,
24
Defendant-Intervener.
25
26
27
28

Case No. C 00-3785 VRW

CITY OF SAN RAFAEL'S OPPOSITION TO MHC'S MOTION TO RECOVER ATTORNEYS' FEES AND COSTS

HON. VAUGHN R. WALKER

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1 **I. INTRODUCTION**

2 Not content with a judgment that eliminates the rent controls in place when MHC
3 purchased the Contempo Marin Park, turning MHC's $19 million investment into a $120 million
4 property and stripping the existing tenants of all but the salvage value of their homes, MHC has
5 submitted a shocking request for $6,893,052.30 in attorneys' fees – 1.8 times what MHC actually
6 incurred – and $1,274,055.37 in costs including more than $735,000 in expert fees expressly
7 prohibited by law. MHC claims to have used 32 lawyers and 29 non-lawyers to staff this case,
8 and to have spent nearly 14,000 hours. No documentation is submitted for these amounts
9 beyond charts with the total amount of time spent by each lawyer and a cursory generic
10 description of which phase some, but not all, of the lawyers worked on. MHC made no effort to
11 reduce its claim to *reasonable* hours, claiming every stray hour where it consulted otherwise
12 uninvolved attorneys on tangential or unspecified matters. MHC seeks *all* of the time its three
13 law firms spent on this case, including the substantial amount of time spent on the breach of
14 contract claims – which it tried to the jury and lost – and on its substantially advances theory,
15 which it also lost. It is difficult to imagine a more defective (and outrageous) fee application.

16 MHC has provided the Court with no factual basis to determine the number of hours
17 reasonably spent on this matter, much less those spent on the post-*Lingle* claims on which MHC
18 prevailed. MHC provides no proof that so many lawyers and non-lawyers were reasonably
19 involved. MHC also fails to provide any basis for assessing fees at the exorbitant rates charged
20 by its Chicago counsel, and claims that work it did in 2002 should be paid at 2008 rates, which
21 would result in yet another substantial windfall to MHC. MHC's bill of costs is equally
22 superficial, and seeks recovery of nearly a million dollars in expressly prohibited costs, while
23 failing to provide the required support for those other costs related to the constitutional claims to
24 which it might otherwise be entitled.

25 MHC's fee and cost requests make a mockery of both the purpose of 42 U.S.C. § 1988 to
26 protect impecunious claimants and the standards of this Court for documenting proper fee and
27 cost requests. MHC's fees should be denied in their entirety without a second chance to submit a
28 proper application. Alternatively, given the relative wealth of the parties, the huge windfall of

1 the result to MHC, the amount of time wasted by MHC on invalid claims, the reasonable amount
2 of time the City spent prevailing on the jury trial, and that the only reason MHC has prevailed on
3 any claim was this Court's decision to allow MHC to add previously discarded theories when it
4 was otherwise clear MHC had lost, the Court quite properly and equitably could conclude that
5 fees awarded each to side offset in their entirety.

6 **II. PREVAILING PARTY STATUS**

7 **A. THE CITY IS THE PARTY THAT PREVAILED ON THE CONTRACT CLAIM**

8 Despite the City's unqualified success on all of MHC's contract claims, MHC
9 nonetheless argues that the City should be denied the attorneys' fees and costs to which it is
10 entitled under the terms of the Settlement Agreement, but instead should pay MHC's fees and
11 costs on those claims. MHC's arguments are contrary to law, and should be rejected.

12 First, MHC asserts that the City is not a prevailing party on MHC's two breach of
13 contract claims because those claims were not brought in an action whose sole purpose was to
14 enforce or interpret the Settlement Agreement. Notably, MHC cites no law to support this
15 nonsensical assertion. MHC sued the City for breach of contract and breach of the implied
16 covenant of good faith and fair dealing. (Docket #78.) Those claims were plainly claims at law
17 "to enforce or interpret the terms or provisions of" the Settlement Agreement within the meaning
18 of paragraph 2.14 of that agreement. MHC's unsupported and illogical insistence that the
19 Settlement Agreement only provides for fees if a *wholly separate* action is brought to interpret or
20 enforce it should be rejected by this Court.

21 Second, MHC asserts that the City should be "estopped" from receiving fees because the
22 City "eschewed and refused to perform." Again, no case law is cited for this wishful
23 proposition. The jury in this case unanimously held that the City *complied with the contract*.
24 MHC also asserts that the City cannot recover fees because it claimed the Settlement Agreement
25 was unenforceable. California law is expressly contrary – even if the jury found *no* agreement
26 existed, the City would be entitled to fees because MHC would have been entitled to fees under a
27 contrary finding. "[I]t has been consistently held that when a party litigant prevails in an action
28 on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or

1 nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing
2 parties would have been entitled to attorney fees under the contract had they prevailed." Santisas
3 v. Goodin, 17 Cal. 4th 599, 611 (1998).

4 Third, MHC asserts that the City only obtained "a formalistic and hollow victory." This
5 is nonsense. MHC sought $45 million from the City on these claims. (TT 11/13/02 p. 65:7-16
6 [MHC Closing Argument] Wagstaffe Decl. ¶¶ 13-14.) Defeating a $45 million claim was
7 neither formalistic nor hollow; indeed, losing the breach of contract claim would have
8 bankrupted the City. MHC argues that California Civil Code section 1717 allows the Court to
9 determine that no party prevailed or that both were prevailing parties on the contract, but that
10 argument also ignores California law. When the decision on the contract claims is an
11 unambiguous verdict for one party, the Court must award fees to that party under section 1717:

12 > [W]hen the results of the litigation **on the contract claims** are **not** mixed – that is, when the decision on the litigated contract claims
13 > is purely good news for one party and bad news for the other – ... a
> trial court has no discretion to deny attorney fees to the successful
14 > litigant. Thus, when a defendant defeats recovery by the plaintiff
> on the only contract claim in the action, the defendant is the party
15 > prevailing on the contract under section 1717 as a matter of law.

16 Hsu v. Abbara, 9 Cal. 4th 863, 875-76 (1995) (emphasis added).

17 Only the City, and not MHC, prevailed on MHC's breach of contract claims. Thus only
18 the City, and not MHC, is entitled to recover its reasonable attorneys' fees and costs on those
19 claims. MHC's request for attorneys' fees and costs attributable to its work on the breach of
20 contract claims must be denied.

21 **B. MHC IS ONLY THE PREVAILING PARTY UNDER 42 U.S.C. SECTION 1988 BECAUSE OF ITS NEW POST-LINGLE CLAIMS**
22

23 MHC cites a variety of cases explaining the broad "prevailing party" standard under 42
24 U.S.C. § 1988, and the City agrees that MHC was the prevailing party on the non-contract
25 claims, despite the fact that MHC *lost* every claim it brought in the first trial. That does not
26 mean, however, that MHC should be awarded all of its fees for work it performed, including
27 work on claims it lost. As discussed below and in the City's moving papers, any fee award to
28 MHC should take into account the fact that MHC prevailed only on claims it brought in 2006,

and that MHC would have lost this entire case had it not been allowed to add new claims to this case several years after the trial had been completed.

III. MHC'S FEE REQUEST SHOULD BE SUBSTANTIALLY REDUCED

A. MHC HAS NO RIGHT TO FEES ON CLAIMS IT LOST

1. Awarding Fees To MHC On The Breach of Contract Claim Would Violate The Plain Terms of The Contract And Be Contrary To Law

As discussed above, the City, not MHC, was the prevailing party on the breach of contract claims, and thus the City is the only party entitled to recover attorneys' fees and costs for work performed on those claims. Hsu, 9 Cal. 4th at 875-76. MHC, however, has provided the Court with no factual basis to distinguish between fees or costs incurred on the contract claims and those incurred on the constitutional claims. Indeed, MHC asserts that it failed to maintain its billing records in a manner that would allow such an allocation. (Bradford Decl. ¶ 24.) MHC had an obligation to "maintain billing time records in a manner that [would] enable a reviewing court to identify distinct claims." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). MHC cannot be awarded fees to which it is not entitled simply because it failed to maintain billing records necessary for the required review.

2. MHC Should Receive No Fees For Work On Its Failed Pre-*Lingle* Claims

As discussed in more detail in the City's motion, any fee award to MHC on its new constitutional claims in this case should also take into account the fact that MHC lost its pre-*Lingle* claims, and made a deliberate choice *not* to bring its *Penn Central* or private takings claims in its initial lawsuit. See Hensley, 461 U.S. at 435 (directing lower courts to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."). The entire first trial was directed at the misguided "substantially advances" claim rejected by the Supreme Court in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005). The hours MHC's attorneys spent on the original bench trial were not "in pursuit of the ultimate result achieved," but were spent exploring constitutional blind alleys unconnected to the

1 Court's subsequent decision. MHC only prevailed on the claims it brought in 2006, and any
2 "prevailing party" determination on the constitutional claims should recognize that fact.
3 Even if *some* of the work on the original trial was related to the claims on which MHC
4 was ultimately successful, plainly it was not *all* so related. MHC has no entitlement to time
5 spent on claims unrelated to the claims on which it prevailed. Hensley, 461 U.S. at 435; Thorne
6 v. City of El Segundo, 802 F.2d 1131, 1141 (9th Cir. 1986) ("If unrelated, the final fee award
7 may not include time expended on the unsuccessful claims."). And even if the time was in some
8 way related, the Court should still reduce MHC's time to reflect the wasted work on the pre-
9 *Lingle* theories. See Hensley, 461 U.S. at 434, 436; Thorne, 802 F.2d at 1141 ("full
10 compensation may be excessive" if plaintiff was only partially successful); Quesada v.
11 Thomason, 850 F.2d 537, 539 (9th Cir. 1988) (reduction of fee award appropriate if plaintiff fails
12 "to obtain relief on all claims, and if hours spent on unsuccessful claims were not needed to
13 pursue successful claims."). The analysis follows logically from the general proposition that
14 "[f]ee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number
15 of hours spent in advancing the successful claims." Corder v. Gates, 947 F.2d 374, 377 (9th Cir.
16 1991). Fees for work that did not contribute to a plaintiff's ultimate success are not "reasonable"
17 and therefore may not be included in an award.
18 MHC's position on this issue is the bare insistence that all of its work on the substantially
19 advances claim was "substantially similar" to the issues raised by its *Penn Central* and private
20 takings claims. That is a curious position given the Supreme Court's clear guidance in *Lingle*
21 that the means-end test required by a substantially advances analysis "prescribes an inquiry in the
22 nature of a due process, not a takings, test, and that it **has no proper place in our takings**
23 **jurisprudence**." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005) (emphasis added).
24 MHC *lost* its due process claim, which this Court correctly held was barred by settled Ninth
25 Circuit law including Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993). (Docket
26 # 554 ¶¶ 169-175.) If the inquiry MHC pursued for the first five years of this case has no proper
27 place in takings jurisprudence, and MHC lost its due process claim, then the time spent on that
28 inquiry must surely *not* be related to MHC's successful takings claims. MHC must suffer a

substantial reduction in time to account for its choice to bring claims in a seriatim fashion and spend the initial years – and trial – in this case focused solely on the claims it lost.

B. MHC'S FEE REQUEST IS UNSUPPORTED BY EVIDENCE

As the Ninth Circuit has recently reaffirmed, "[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007). Inadequate documentation is grounds for denying or reducing the fee award. For example, fees can be reduced for block billing "because block billing makes it more difficult to determine how much time was spent on particular activities. Id. (citing Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 971 (D.C. Cir. 2004) (reducing requested hours because counsel's practice of block billing "lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness"); Hensley, 461 U.S. at 437 (holding that applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims"); Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1121 (9th Cir. 2000) (holding that a district court may reduce hours to offset "poorly documented" billing).) "The district court may reduce the award where the hours claimed are not adequately documented." McGrath v. County of Nevada, 67 F.3d 248, 254 (9th Cir. 1995).

MHC has failed to meet even this minimal burden. No time records have been produced; instead, attached to the Declaration of David Bradford are charts that purport to list the aggregate amount of time spent by each lawyer over the entire eight year period of this case. No division is provided by year or task. (Bradford Decl. Exs. A-E.) It is absolutely impossible based on this submission to determine who did what, when, or why.

Exhibits A-C to Mr. Bradford's declaration lists the names and background of the lawyers. What they did, however, is not meaningfully described and amounts to little more than "worked on the case" in most instances. There is certainly no detail that would allow the Court to determine what work was necessary, what was duplicative, or even in most instances to what issues the work related. The following chart extracts verbatim the work descriptions provided by MHC's submission:

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Attorney	Description of work	Hours Claimed
David J. Bradford	"Mr. Bradford was lead counsel throughout this litigation."	2127.75
Lisa T. Scruggs	"Ms. Scruggs served as the lead associate on the case through the 2002 trial and as a second chair trial counsel during the 2007 proceedings and discovery related thereto."	2638.75
Bradley Yusim	"Mr. Yusim has served as an associate on the case and has had extensive involvement in preparing briefs in the case."	683.75
Barry Levenstam	"Mr. Levenstam was consulted, as an appellate specialist, on issues related to the City's request for a stay pending appeal."	25
Terri L. Mascherin	No description provided	2
Mark Heilbrun	"Mr. Heilbrun was consulted on issues related to the severability of laws."	14
Matt D. Basil	"When an associate, Mr. Basil assisted in preparing the 2002 trial proceedings including significant work in preparing the pre-trial order and various motions in limine."	241.75
C. Steven Tomashefsky	"Mr. Tomashefsky was consulted on certain issues."	4.75
Sean Herring	"Mr. Herring conducted research and drafted pleadings on issues related to severability and the request for a stay pending appeal."	89.5
Jason Green	"Mr. Green worked as an associate preparing the case for trial."	250.75
April Otterberg	"Ms. Otterberg conducted legal research on issues related to the takings claims."	17.75
Shannon Jones	"Ms. Jones performed research as an associate on issues related to the scope of relief."	7
Benjamin Weinberg	"Mr. Weinberg served as second chair trial counsel on the case and remained active on it until he left the firm ... in 2003."	1145
Christine Hill	"Ms. Hill served as an associate on the case and had extensive involvement in preparing briefs in the early phases of the case."	128.75
Therese Tully	"Ms. Tuly worked as an associate and had involvement in preparing briefs in the case."	146.25
Nanci Rogers	"Ms. Rogers was extensively involved as an associate in the discovery phase of the case and in preparing the case for trial in 2002."	1028.25

Attorney	Description of work	Hours Claimed
Daniel Konieczny	"Mr. Konieczny was extensively involved as an associate in the discovery phase of the case and in preparing the case for trial in 2002."	1004.75
Katharine Saunders	"Ms. Saunders served as an associate and worked on various motions in limine in preparation for trial in 2002."	143.5
Hannah Stotland	"Ms. Stotland served as an associate and conducted legal research on issues related to the takings claims."	19.75
6 summer associates	No description of work or time of work.	115 collectively
10 paralegals and 13 project assistants	No description of work or time of work	3056 collectively
Robert Coldren	No description provided	235.9
C. William Dahlin	No description provided	221.9
Mark Alpert	No description provided	15.5
Robert Mulvihill	No description provided	15.6
Robert Williamson	No description provided	24.7
William Hart	No description provided	0.4
Andrew Sussman	No description provided	1.7
Scott Shintani	No description provided	.5
Steven Lowery	No description provided	1.2
Diane Haugeberg	No description provided	5.7
Jason Pyrz	No description provided	18.5
2 Paralegals/Legal Assistants	No description provided	15.7
Kenneth E. Keller	"Mr. Keller served as local counsel in this matter and assisted with the 2002 trial."	277.1
Michael D. Lisi	No description provided	.7
Ingrid Leverett	"Ms. Leverett served as an associate and assisted in preparing the case for trial in 2002."	106.7
3 paralegals/legal assistants	No description provided	157.4

These descriptions, tables comparing these hours to various rates, and generalized statements in Mr. Bradford's declaration are the only "evidence" MHC has submitted to justify its enormous fee request. These cursory assertions provide no basis for the City to prepare a detailed response to specific unreasonable expenditures, and provide the Court with no basis to determine what was done, whether it was reasonable, and whether it related to claims that MHC won or claims that MHC lost.

The Ninth Circuit has provided clear direction that an unsupported fee request such as this one should be denied:

> Illegible, abbreviated time records, submitted in a form not reasonably capable of evaluation, do not satisfy the 'burden of submitting detailed time records justifying the hours claimed.' It is an abuse of discretion to award fees for hours not properly documented.

Stewart v. Gates, 987 F.2d 1450, 1452-53 (9th Cir. 1993). Because MHC has failed to meet its burden of documenting its fees in a manner that allows either the Court or the other parties to meaningfully analyze the work performed, MHC's fee request should be denied.

C. MHC'S FEE REQUEST IS UNREASONABLE

As the Supreme Court has noted "The district court also should exclude from [the] initial fee calculation hours that were not 'reasonably expended.' [ ] Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary...." Hensley, 461 U.S. at 434. MHC has failed to make this effort, submitting an outrageous request for the work of 61 people in three law firms spending almost 14,000 hours.

1. It Was Unreasonable For MHC To Retain 32 Lawyers and 29 Non-Lawyers To Work On This Case

MHC's charts list time for 32 lawyers, 6 summer associates, 10 paralegals, and 13 project assistants. (Bradford Decl. Exs. A-E.) The only explanation for this vast number of people working on the case is a generic statement that the case has been ongoing for more than six years and that attorneys have changed firms or skills. (Bradford Decl. ¶ 9.) No information is provided to enable the Court to determine how many lawyers worked on the file at any given time, or whether that amount was reasonable or necessary. No explanation is provided as to why the 11 person Hart, King and Coldren ("HK&C") litigation team – whom Exhibit B to Mr. Bradford's declaration describes as experts in this area – could not have handled this case on their own, at their *substantially* lower (and more reasonable) hourly rates. Nor is there any explanation as to why local counsel Krieg, Keller, Sloan, Reilley and Roman ("KKSRR") needed to be retained in addition to HK&C or could not have handled the case in lieu of Jenner & Block,

nor of why so much work was done by KKSRR lawyers as "local counsel." Indeed, the only active involvement of KKSRR lawyers in court proceedings was during the jury trial on the breach of contract claims, which MHC *lost* by unanimous verdict.

Obviously MHC has the right to hire as large a team of lawyers as it chooses, but that does not make the number of lawyers reasonable. There must be *some* overlap and duplication with so many attorneys. But MHC has provided no documentation that would allow the City or the Court to analyze that issue. There is simply no factual basis in the record to find that MHC's use of so many lawyers and assistants was reasonable for purposes of a fee award.

2. It Was Unreasonable For MHC To Spend More Than Ten Thousand Attorney Hours On This Case

Not only is the number of lawyers claimed by MHC unreasonable, the total hours worked is patently excessive as well. MHC's fee application claims 10,640.35 hours worked by 32 lawyers. (Bradford Decl. Exs. A-E.) It also claims 115 hours worked by summer associates, and 3,229.1 hours worked by paralegals and case assistants. (Id.) As discussed above, MHC does not submit bills, and the descriptions in Exhibits A-C to the Bradford Declaration provide virtually no explanation for what was done, when, or why. "The district court may not 'uncritically' accept the number of hours claimed by the prevailing party, even if actually spent on the litigation, but must, in order to award fees based on them, find 'that the time actually spent was reasonably necessary.'" Carson v. Billings Police Dept., 470 F.3d 889, 893 (9th Cir. 2006) MHC has simply provided no factual basis for this Court to conclude that this time was reasonably necessary.

MHC's claimed hours are nearly twice those incurred by the City. The Ninth Circuit has held that the number of hours spent by the other side is "a useful guide in evaluating the appropriateness of time claimed. If the time claimed by the prevailing party is of a substantially greater magnitude than what the other side spent, that often indicates that too much time is claimed." Democratic Party of Washington State v. Reed, 388 F.3d 1281, 1287 (9th Cir. 2004). Here, including all phases of the case, the City's attorneys spent a total of 5,566 attorney hours and 877 paralegal hours. (Wagstaffe Suppl. Decl. ¶ 5.) This includes changing legal counsel

twice, a circumstance that the City agrees leads to unreasonable duplication. Notably, the City has not sought the fees of any of its prior firms in its own fee application on the contract claim. Nonetheless, it is clear that MHC's attorneys spent 1.9 times more attorney hours and 3.7 times more paralegal hours on this case than the City's counsel. The City submits that the *maximum* potential number of *reasonable* hours for MHC is 5,566 attorney hours and 877 paralegal hours – the same time spent by the City – and even that amount must be reduced so that it does not include time on the contract claims and other claims MHC lost. Indeed, unless and until MHC provides some legitimate evidentiary basis to support its request, there is no ground for this Court to find that *any* of the hours claimed by MHC are reasonable.

MHC makes much of the age of this case, but the truth is that most of that time was *not* spent litigating, but instead was spent with the case stayed and/or matters under submission for one reason or another. The actual litigation of this case primarily took place between November 2001 and January 2003, for a brief period following *Lingle* in 2005, and then from December 2006 through the current date. The jury trial – which MHC lost – lasted only ten trial days, and the two court trials together only lasted another nine trial days. MHC's expenditure of nearly 14,000 attorney and paralegal hours – more than twice the total time spent by the City's counsel – is mind boggling under these circumstances. MHC has provided the Court with no basis to conclude that the number of hours it seeks was reasonable and necessary, and the City's experience in the same case strongly suggests that it was not. The Court should deny MHC's requested hours. In the alternative – assuming MHC is given yet another chance to present legitimate evidentiary support for its fees claim – under no circumstances should the Court award more than the City's hours as a reasonable amount on this case, *less* the time MHC spent pursuing the breach of contract claims and the "substantially advances" theory that has "no proper place" in takings jurisprudence.

3. MHC Should Be Limited To The *Laffey* Rates Consistently Used By This Court, And Not Awarded The Unreasonable, Exorbitant Rates Charged By Its Chicago Counsel

It is well settled that a prevailing party's fees are *not* simply based on what rate was actually charged, but must be based on fees in line with "the prevailing market rate in the

1 relevant community."[1] Carson, 470 F.3d at 893; Chalmers v. City of Los Angeles, 796 F.2d
2 1205, 1210-11 (9th Cir. 1986). This Court has consistently applied this rule by looking to the
3 *Laffey* Matrix, as modified by federal locality pay adjustments. See In re HPL Technologies,
4 Inc. Securities Litig., 366 F. Supp. 2d 912, 921-922 (N.D. Cal. 2005) (Walker, C.J.); In re Portal
5 Software, Inc. Securities Litig., 2007 WL 4171201 at *15 (N.D. Cal. Nov. 26, 2007) (Walker,
6 C.J.); Young v. Polo Retail, LLC, 2007 WL 951821 at *7-8 (N.D. Cal. Mar. 28, 2007) (Walker,
7 C.J.); Garnes v. Barnhardt, 2006 WL 249522 at *7 (N.D. Cal. Jan. 31, 2006) (Walker, C.J.).

8 Exhibit E of the Bradford declaration purports to list the *Laffey* rates for MHC's vast
9 legal team, but it contains *2008* rates, *not* the rates applicable when the work was actually done,
10 the bulk of which should have been in 2002 (although, again, MHC's submission provides no
11 basis to determine when the work it is claiming was performed or that the work related to the
12 claims on which MHC prevailed). The chart attached as Exhibit B to the Supplemental
13 Declaration of James Wagstaffe lists the *Laffey* rates for 2000-2008, and the City submits that
14 these rates should be used for any time awarded to MHC in this case, with the rate for each
15 lawyer based on the time the work was performed and the lawyer's experience at that time –
16 exactly the same way the City submitted its fee request. (Wagstaffe Suppl. Decl. ¶¶ 2-3 & Ex.
17 B.)

18 It is impossible on the current record, to calculate what MHC's appropriate fees would be
19 at a *Laffey* rate, because, as discussed above, MHC has not provided any information about what
20 was done or when. For that reason as well, MHC's fee request should be denied.

21 **D. MHC SHOULD NOT BE GIVEN AN "ENHANCEMENT"**

22 MHC's own evidence proves that it *actually* spent $3,846,456.87 in legal fees on this
23 entire case – an amount that is plainly excessive and undocumented for the reasons discussed
24

25 [1] It bears repeating here that the exorbitant rates charged by MHC's Chicago counsel are
26 substantially higher than the rates charged by either of its two California firms. (Compare rates in Exhibits A, B, and C to the Bradford Declaration.) Thus, aside from this Court's consistent
27 adherence to the *Laffey* standard, the evidence before the Court plainly shows that MHC could have obtained, and did obtain, adequate legal counsel at rates far lower than the rates charged by
28 Jenner & Block.

above. (Bradford Decl. ¶ 17.) MHC asks the Court, however, to award it more than $6.7 million in fees, nearly $3 million more than it actually spent, as an "enhancement" by applying the claimed 2008 rates of MHC's counsel to calculate the "reasonable fee." Alternatively, MHC asks the Court to apply 2008 *Laffey* rates, which would result in a $4.185 million award. It is impossible to determine what the contemporaneous *Laffey* rate calculation would be because, as discussed above, MHC has failed even to inform the Court of when fees were incurred, much less document its billing entries. It is clear, however, that application of 2008 *Laffey* rates would still reflect a substantial enhancement over the contemporaneous *Laffey* rates for the time charged by MHC's lawyers and paid by MHC.

In support of its request, MHC cites a single decision by this Court in which a *contingency fee award* to plaintiffs lawyers who had foregone payment during the litigation was made based on contemporaneous rates. As the quote MHC provides itself states, current rates were awarded in that case because "counsel [had] not been paid contemporaneously with their work in this case." Young v. Polo Retail, LLC, 2007 WL 951821 at *6 (N.D. Cal. Mar. 28, 2007) (Walker, C.J.). That is consistent with other *contingency fee* cases that award current rates to lawyers who have foregone periodic payment while prosecuting a case. See Barjon v. Dalton, 132 F.3d 496, 502-03 (9th Cir. 1997) ("The Supreme Court has established that an appropriate adjustment *for delay in payment of fees* is within the contemplation of § 1988.") (emphasis added); Gates v. Deukmejian, 987 F.2d 1392, 1406-07 (9th Cir. 1992) (district court has discretion to award fees in contingency case at current rates to reflect lost income by plaintiffs' counsel). Even in the contingency context, however, "[p]roof that an award at current rates will result in a windfall to the prevailing attorneys may be ground to deny use of current rates." Gates, 987 F.2d at 1407 n. 19.

The logic of these cases simply does not apply here; plaintiffs' lawyers *have* all been paid contemporaneously for their work. (Bradford Decl. ¶¶ 16-17.) The City is not aware of *any* case awarding current rates to a corporate plaintiff that contemporaneously paid its lawyers on an hourly basis. Indeed, such an award would be nonsensical – if a first year lawyer performed work in 2002, how can a "reasonable fee" for that work be the rate charged by a seventh year

lawyer in 2008 for the same number of hours? There is simply neither logic nor case authority that supports awarding MHC more in attorneys' fees than it actually paid over the years by basing the award on the 2008 rates and experience levels of MHC's counsel.[2]

To the contrary, once MHC's reasonable fees on the claims for which it prevailed have been determined – a task that cannot be performed with the paucity of evidence submitted by MHC – that amount should be reduced to reflect the enormous windfall that eliminating the Ordinance provides to MHC and the purely private nature of MHC's claims. In Herrington v. County of Sonoma, 883 F.2d 739 (9th Cir. 1989), the Ninth Circuit noted that the fee awarded to a wealthy landowner plaintiff prevailing on a takings claim can be adjusted *downward* in recognition of the large damages award and the fact that the plaintiff was "pursuing a private property right rather than a broader public policy goal." Herrington, 883 F.2d at 746, citing J. & J. Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1473 (10th Cir. 1985) (plaintiff's enforcement of private property right is not a bar to fee award, but is a factor to be considered in setting the amount of any award). That is the situation here: any award of attorneys' fees to MHC should be substantially reduced in consideration of the enormous economic benefits that MHC, and only MHC, hopes to derive from this case.

The Court should also consider the relative wealth of the parties in setting the amount of any fee award. See Munson v. Friske, 754 F.2d 683, 697 (7th Cir. 1985) ("The courts have held that fee awards are an equitable matter, thereby permitting the district court to consider the relative wealth of the parties."); Faraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025, 1028 (2nd Cir. 1979) ("because fee awards are at bottom an equitable matter, courts should not hesitate to take the relative wealth of the parties into account.") (citations omitted). MHC is a wealthy company; according to the 2006 10-K introduced at trial, it has more than $2 *billion* in assets,

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[2] If the Court were to apply the 2008 *Laffey* rates, it should apply them to both sides, not just MHC. The City of San Rafael's fee request on the breach of contract claim would be $1,133,404.83 if 2008 *Laffey* rates were applied to the City's counsel's work on the breach of contract claims. (Wagstaffe Suppl. Decl. ¶ 4 $ Ex. C.) The City respectfully requests the Court to apply the same analysis to its fees as it does to MHC and grant fees based on 2008 rates to the City if the same rates are granted to MHC. However, as demonstrated above, the correct result is to apply contemporaneous *Laffey* rates to both sides, not 2008 rates.

1 and rental property income of over $200 million per year. (Tr. Ex. 359 pp. MHCCM2 02152-
2 53.) By contrast, the City's annual budget is based on a beginning general fund balance of
3 approximately $6.7 million, and then $94 million in revenues and $94 million in expenses.
4 (Request for Judicial Notice of City Budget.) Awarding millions of dollars in attorneys' fees to
5 MHC would not only be unfair in light of the tremendous windfall it has received in this case, it
6 would seriously jeopardize the financial health of the City of San Rafael. Indeed, the City
7 suggests that given the relative wealth of the parties, and the enormous windfall this Court's
8 order will provide to MHC if it is upheld on appeal, it would be fair and just for the Court to set
9 MHC's fees and costs on the constitutional claims at the same amount as the City's fees and
10 costs on the contract claims, which would result in no net payment to either side.

11 **E. MHC HAS FAILED TO DOCUMENT ITS WESTLAW OR LEXIS CHARGES AS "ATTORNEYS' FEES"**
12
13 MHC also asks for $92,192.05 in Westlaw and Lexis charges as "attorneys' fees," citing
14 a Ninth Circuit ERISA case which allows such expenses if separate billing is "the prevailing
15 practice in the local community," but noting the existence of a Circuit split on the issue.
16 Trustees of Construction Industry v. Redland Ins. Co., 460 F.3d 1253, 1258-59 (9th Cir. 2006)
17 (and cases cited therein). MHC has provided no record evidence to make such a finding.
18 Moreover, it has also provided no evidence beyond its own non-descriptive list of charges,
19 explaining what was researched, why, or how it was necessary to this case.
20 In addition, it is well known that the nominal "charges" provided in Westlaw and Lexis
21 bills do not accurately reflect the expense of those services. Law firms can obtain "flat rate"
22 online research services. Each month, Westlaw provides a "bill" that purports to state the
23 "value" of each online session, the aggregate sum of which far exceeds the actual flat rate paid
24 by the law firm. (Wagstaffe Suppl. Decl. ¶ 6.) There is no way to tell from MHC's submission
25 whether the claimed amounts were actually paid to Westlaw or Lexis, much less whether they
26 are for reasonable research in this case on the issues on which MHC prevailed. For example,
27 MHC purports to have spent a total of $26,592.95 on November 15, 2002, the day after the jury
28 verdict in favor of the City on the breach of contract claims. (Bradford Decl. Ex. F.) MHC filed

its motion for judgment as a matter of law that same day. (Docket # 351.) It is reasonable to infer – which is all that is possible on this record given the lack of any proof presented by MHC – that these extraordinarily high charges were related to the contract claims and MHC's attempt to overturn the jury verdict, *not* to the constitutional claims.

The right to Westlaw and Lexis charges as "attorneys' fees" under 42 U.S.C. § 1988 is not clearly established and, moreover, MHC has not presented any evidence demonstrating that the charges it is claiming were reasonably incurred in connection with the claims on which it prevailed. MHC's request for these charges should be denied.

IV. MHC'S COST BILL SHOULD BE DENIED OR SUBSTANTIALLY REDUCED

Along with its overreaching and undocumented fee request, MHC has submitted a patently unreasonable bill of costs totaling $1,274,055.37. MHC has refused even to consider the plainly established limits on recoverable costs, and claims a variety of expenses that are categorically prohibited by statute and the local rules. For example, MHC seeks reimbursement of $169,827.13 for attorney travel costs, which are flatly prohibited. MHC also claims $735,061.43 in expert fees, when such fees are limited by statute to ordinary witness fees of $400. Those grossly excessive costs must be disallowed.

Even for areas where MHC might be entitled to recover some costs, it has utterly failed to produce even a shred of the required documentation that might allow the Court to evaluate whether any of the listed expenses were reasonable, necessary, and not related to the breach of contract claims on which the City, not MHC, is entitled to costs. MHC has blatantly disregarded the rule that it submit with its bill "[a]ppropriate documentation to support each item claimed." Civil L.R. 54-1. Most glaringly, MHC requests $241,587.26 in copying costs—equivalent to 2.4 million pages—without listing any of what was being copied or submitting a single receipt.

Because MHC's costs are unreasonable, unwarranted, unspecified and unsupported, the Court should deny any award of costs to MHC, or reduce any award significantly.

A. SECTION 1920 LIMITS COSTS THAT MAY BE TAXED

28 United States Code section 1920 sets forth the items that a district court may permissibly tax as costs. Recovery may not be awarded for any costs not specifically listed in

section 1920. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441–42 (1987) ("Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in [Federal Rules of Civil Procedure] Rule 54(d)."); see also Yasui v. Maui Elec. Co., Ltd., 78 F. Supp. 2d 1124, 1126 (D. Haw. 1999) ("Courts do not have discretion under Fed. R. Civ. P. 54(d) to tax whatever costs seem appropriate. Rather, courts may tax only those costs defined in 28 U.S.C. § 1920."). The *only* costs recoverable pursuant to section 1920 are:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

On the other hand, a district court has the latitude to reduce or even deny costs to a prevailing party. Fed. R. Civ. P. 54(d) (allowing an award of costs unless the court otherwise directs); Association of Mexican-American Educators v. State of Calif., 231 F.3d 572, 591–92 (9th Cir. 2000). Costs may be denied altogether when, as here, a party prevails on some claims but loses others. "In the event of a mixed judgment … it is within the discretion of a district court to require each party to bear its own costs." Amarel v. Connell, 102 F.3d 1494, 1523 (9th Cir. 1996). A court may also decline to award costs in recognition of the losing party's limited financial resources. Association of Mexican-American Educators, 231 F.3d at 592; Champion Produce, Inc. v. Ruby Robinson Co., Inc., 342 F.3d 1016, 1022–23 (9th Cir. 2003).

The district court must also scrutinize the request to ensure that reimbursed costs are not unreasonable or excessive. "[T]he costs and expenses incurred by counsel are subject to a test of relevance and reasonableness in amount. … The judge must look at the practical and reasonable needs of the party in the context of the litigation." In re Media Vision Technology Securities

1 Litigation, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). A cost award should, for example, be
2 reduced where "the prevailing party has unduly extended or complicated resolution of the
3 issues." ADM Corp. v. Speedmaster Packaging Corp., 525 F.2d 662, 665 (3d Cir. 1975).

4 **B. MHC HAS UTTERLY FAILED TO SPECIFY OR DOCUMENT ITS COSTS**

5 As stated in this Court's local rules, a bill of costs "must state separately and specifically
6 each item of taxable costs claimed." Civil L.R. 54–1(a). "The prevailing party bears the burden
7 of stating its costs with the requisite specificity, and the prevailing party necessarily assumes the
8 risks inherent in a failure to meet that burden." Terry v. Allstate Ins. Co., 2007 WL 3231716 at
9 *1 (E.D. Cal. Nov. 1, 2007) (citing Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1208 (10th
10 Cir. 1986)). MHC has not met that obligation—its bill of costs relies on nothing more than a
11 cursory list of expenses MHC claims should be reimbursed. The Court cannot award costs
12 without sufficient detail to know whether costs meet the definition set forth in section 1920.
13 Collins v. Gorman, 96 F.3d 1057, 1058 (7th Cir. 1996) (vacating award where court could not
14 "make head nor tail of the bill of costs"). For example, it was reversible error for a district court
15 to award costs based on nothing more than a "spreadsheet contain[ing] a list of names of these
16 service providers, the amounts paid, and a blanket assertion that the costs incurred are among
17 those allowed under § 1920"—exactly what MHC has submitted here. See English v. Colorado
18 Dept. of Corrections, 248 F.3d 1002, 1013 (10th Cir. 2001). The standard rises when the bill of
19 costs is challenged. While a general affidavit stating that "'each item of cost or disbursement
20 claimed above is correct and has been necessarily incurred in the above action …' may be
21 sufficient in support of an unopposed motion to tax costs, such evidence clearly falls short of
22 meeting [the requesting party's] burden of proof after the necessity and reasonableness of the
23 costs have been challenged." Berryman v. Hofbauer 161 F.R.D. 341, 344, n. 2 (E.D. Mich.
24 1995).

25 Furthermore, MHC has blatantly disregarded this Court's requirement that the requesting
26 party attach "[a]ppropriate documentation to support each item claimed" in the bill of costs.
27 Civil L.R. 54-1. There is absolutely no means for the Court or the other parties to verify the
28 accuracy of the amounts requested or to ensure that they were actually expended. The backup

documentation would also provide additional detail about the nature of the expenses that might shed light on their propriety. MHC's failure to comply with the Court's express documentation requirements should disqualify it from any costs award.

C. MHC CANNOT NOT RECOVER COSTS ON THE CONTRACT CLAIM

MHC lost the contract claim, yet includes in its bill costs associated with the separate jury trial of that matter. The contract between the parties plainly provides that the party prevailing on the contract – the City – is entitled to costs, not MHC. (Settlement Agreement § 2, 14.) MHC cannot be awarded costs that it incurred on the breach of contract claims. Because MHC has failed to make any attempt to distinguish those costs from its other costs, MHC's entire cost bill should be denied or, at a minimum, MHC should be required to revise its bill to clarify which expenses relate to the contract claim.[3]

D. MHC'S BILL OF COSTS MUST BE DRAMATICALLY REDUCED

If the Court were to allow MHC to recover some of its costs, most of the costs claimed on MHC's bill must be disallowed or reduced significantly.

1. Categorically Prohibited or Capped Expenses Must Be Disallowed

MHC seeks reimbursement of expenses that fall entirely outside section 1920 and may not be recovered as costs. All of those costs must be disallowed. In addition, it claims expert witness fees which are strictly capped by statute, and any excess must be disallowed.

a) Travel Expenses of Attorneys

MHC seeks reimbursement for the travel costs of its attorneys and other personnel to and from depositions, court proceedings and trial. "[I]t is well established that an attorney's expenses in attending both depositions and other court proceedings are not recoverable as costs." United States ex rel. Stierli v. Shasta Services Inc. 2007 WL 1516934 at *1 (E.D. Cal. May 22, 2007) (citing Wahl v. Carrier Mfg. Co., Inc., 511 F.2d 209, 217 (7th Cir. 1975)); see also Yasui, 78 F. Supp. 2d at 1130 ("[T]he travel expenses of attorneys are not recoverable under § 1920.");

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[3] The City's reasonable costs set forth in its bill for expenses associated with the contract claim should also be taken as evidence of the blatant unreasonableness of MHC's cost claim.

Terry, 2007 WL 3231716 at *4 ("With respect to travel expenses incurred by Allstate's attorneys, the court concludes that Allstate is not entitled to recover such costs under § 1920."). Section 1920 makes no mention of travel costs, and the local rules expressly prohibit "expenses of counsel for attending depositions." Civil L.R. 54-3(c)(2). MHC cannot recover any of its travel costs.

Even if attorney travel expenses were recoverable—which they are not—MHC's bill of costs should be reduced because it includes unwarranted and unspecified expenses. Though the lack of specificity also makes it difficult to evaluate the reasonableness of most of its expenses, a few examples demonstrate general excessive spending. In one item, MHC lists a single airplane ticket for MHC's lead attorney David Bradford, presumably between Chicago and San Francisco, which cost $1,818.20 for a scheduled trip that could have been taken for considerably less. Another item lists $2,203.38 airfare for MHC's in-house counsel Ellen Kelleher, who lives in the Chicago area. Under what theory does a corporate representative of the plaintiff who was a witness at trial get her travel costs assessed to the other side? These requests are patently inappropriate.

Furthermore, virtually all of the claimed travel expenses would not have been incurred had MHC simply retained local counsel. As one court put it when declining to award costs for attorney airfare, meals and lodging, "[D]efendants chose to hire [out-of-town] counsel rather than local defense counsel. To now ask that plaintiff be penalized for defendants' choice of out of town counsel is absurd and unconscionable." Trohoske v. McDonough Power Equipment Co., 118 F.R.D. 425, 426 (W.D. Pa. 1988).

In total, MHC seeks reimbursement for $169,827.13 in travel expenses, none of which are permitted by section 1920, and all of which must be disallowed.

b) Postage and Messenger Fees

MHC improperly claims reimbursement for $35,135.36 in "postage and messenger fees." Because Section 1920 does not mention postage and messenger fees, neither is recoverable as costs. Duckworth v. Whisenant, 97 F.3d 1393, 1399 (11th Cir. 1996) ("Plaintiff's affidavits appear to include costs such as … postage ... which are clearly nonrecoverable."); In re Glacier

Bay, 746 F. Supp 1379, 1394 (D. Ala. 1990) (Federal Express and local delivery service not included in costs within the meaning of section 1920). Even if they were, MHC has not specified what was being mailed or messengered, from whom, or to whom, making it impossible to determine whether any of the expenses were reasonable or necessary. The entire amount must be disallowed.

c) Fax and Phone Charges

Similarly, MHC requests reimbursement for $2,571.43 in fax and phone charges. Other than stating whether expenses are for phone or for fax, MHC provides absolutely no other detail concerning these charges. Phone and facsimile charges are not recoverable as costs. In re Glacier Bay, 746 F. Supp at 1394.

d) Service and Filing Fees

MHC lumps together various expenses under the heading "Service and Filing Fees." None of the fees appear to be clerk fees, but rather fees paid to outside companies that provide administrative services to law firms. A number of the expenses are for the services of One Legal, which acts as a courier to deliver papers to the Court. "Courier costs are not listed in section 1920 and are not taxable as costs." Yasui, 78 F. Supp. 2d at 1128 (disallowing Federal Express charges as costs). Expenses for One Legal (including an unspecified "fax and file" service) total $1,288.75 and must be deducted from the bill of costs. MHC provides no detail about the other expenses in this category, and thus none should be included as costs.

e) Expert Witness Fees

Ignoring clearly settled Supreme Court law and this Court's rules, MHC requests reimbursement of its expert witness fees in the amount of $735,061.43. This request is patently frivolous. Federal statutes sets witness fees at $40 per day. 28 U.S.C. § 1821. The local rules prohibit awarding as costs any expert expenses beyond the fees provided for in section 1821: "No other witness expenses, including fees for expert witnesses, are allowable." Civil L.R. 54-3(e). The local rules follow clear Supreme Court precedent ruling that "a federal court may tax expert witness fees in excess of the $30-per-day limit set out in [28 U.S.C.] § 1821(b) only when the witness is court-appointed." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442

(1987). Though the statutory limit has since been raised to $40 per day of testimony, the underlying prohibition on granting expert fees as costs remains unabated. See, e.g., Evanow v. M/V Neptune, 163 F.3d 1108, 1117 (9th Cir. 1998) ("The trial court did not have the power to award expert witness fees as costs."); Association of Flight Attendants, AFL-CIO v. Horizon Air Indus., Inc., 976 F.2d 541, 551–52 (9th Cir. 1992) (reversing improper award of expert witness fees as costs). The Court appointed no expert witnesses in this case, and therefore MHC is not entitled to recover more than $40 per day of testimony for any of its expert witnesses.

Of the eight experts listed on MHC's bill of costs, only four actually testified, adding up to ten witness days. MHC is therefore entitled to recover no more than ten times $40, or $400, as expert witness fees. MHC's bill of costs must therefore be reduced by $734,661.43.

f) Summary of Prohibited Costs

In total, MHC has included $943,683.93 in costs which are categorically excluded or for which it seeks reimbursement in excess of a strict statutory maximum:

Category	MHC Request	Not Prohibited	Difference
Travel expenses: depositions	$44,486.89	$0	($44,486.89)
Travel expenses: hearings	$14,216.24	$0	($14,216.24)
Travel expenses: trial	$111,124.00	$0	($111,124.00)
Service and filing fees	$2,478.75	$1,190.00	($1,288.75)
Postage and messenger fees	$35,135.36	$0	($35,135.36)
Fax and phone charges	$2,571.26	$0	($2,571.26)
Expert witness fees	$735,061.43	$400.00	($734,661.43)
Total:		**$1,590.00**	**($943,483.93)**

2. Other Expenses Must be Disallowed Except to the Extent MHC Can Show They Were Reasonable and Necessary

MHC also seeks reimbursement for a huge volume of expenses about which it provides scant detail and absolutely no documentation. These costs are unreasonable on their face, and should be disallowed unless and until MHC can prove that they were reasonable and necessary to its trial of this matter.

a) Transcript Fees

MHC lists $73,810.06 in costs for transcripts, which appear to include deposition transcripts, daily court transcripts during trial, and transcripts of hearings. MHC has lumped

1 together all three, and its vague descriptions make it difficult to determine which transcribed
2 proceeding corresponds with which line item. At a minimum, MHC should not be allowed to
3 recover any costs for transcripts until it clearly sets forth which transcripts it is claiming as costs.
4 MHC also jumbles together costs for deposition transcripts. The local rules limit
5 deposition costs to an original and a single copy. Because it is impossible to tell what each line
6 item includes (some are described only as "Court Reporter Charge"), MHC has failed to
7 demonstrate that its costs fall under the rule. Unless and until it does so, MHC should not be
8 allowed to recover transcript costs.

9 *b) Deposition Videotape*

10 MHC separately requests reimbursement for $10,233 in costs associated with videotaping
11 depositions. Such costs are recoverable only when "reasonable and necessary"—and are not
12 necessary when the deposition is also transcribed. See Barber v. Ruth, 7 F.3d 636, 645 (7th Cir.
13 1993); Cherry v. Champion Int'l Corp., 186 F.3d 442, 449 (4th Cir. 1999). MHC provides no
14 explanation of why it was necessary for it to videotape any depositions for use in the
15 constitutional bench trials. These fees should be disallowed in their entirety.

16 *c) Copying Costs*

17 MHC requests reimbursement for a staggering $241,587.26, the equivalent of more than
18 2.4 *million* pages at the reasonable rate of ten cents per copy. MHC's copying costs are
19 manifestly unreasonable and should be denied.
20 Only copies necessarily obtained for use in the case may be recovered as costs. Though
21 this may include more than just the exhibits presented at trial, costs may *not* include every
22 document "that may pass through a law firm's xerox machines." Fogleman v. ARAMCO, 920
23 F.2d 278, 286 (5th Cir. 1991). The local rules limit photocopy costs to government records,
24 discovery, and trial exhibits, but prohibit inclusion of "motions, pleadings, notices, and other
25 routine case papers." Civil L.R. 54-3(d)(3). Copying costs may not be awarded unless the
26 requesting party provides sufficient documentation to demonstrate what was copied and whether
27 the copies were reasonable and necessary. Yasui, 78 F. Supp. 2d at 1128.
28

1 MHC's itemization of its claimed copying costs is a monument of superficiality. MHC's
2 multi-page chart of copying expenses simply lists a date, an amount, and the words
3 "Photocopying" or "Photocopy Expense." It is impossible to ascertain what was being copied,
4 for what purpose, and at what expense, and therefore it is impossible to determine which
5 photocopying expenses (if any) fall within the rules. In other cases, courts have disallowed
6 copying cost requests even when the requesting party provides the type of detail that is absent
7 from MHC's costs bill. In El Dorado Irrigation Dist. v. Traylor Bros., Inc., 2007 WL 512428 at
8 *10 (E.D. Cal. Feb. 12, 2007), for example, the requesting party submitted sixty-four pages of
9 copying receipts bearing hand annotations describing the utility of the expense. The court
10 nevertheless denied the request, holding that

11 > Put simply, not enough has been done to explain and justify these
12 > costs. The mere recital of the phrase 'necessarily obtained' is not
> enough to justify copy costs of $41,034.99. The court cannot say
13 > with certainty that all the copies were necessarily obtained for use
> in the case.

14 Id.

15 The scant detail in the bill of costs demonstrates that at least some of the expenses MHC
16 seeks as costs are not reimbursable. For example, it lists a total of exactly $75,000 for "Outside
17 Professional Services Performed on 10/31/02 for TrialGraphix," that is, services for MHC's
18 audiovisual equipment technician during the breach of contract jury trial which MHC lost. Such
19 expenses are also not recoverable as costs. Coats v. Penrod Drilling Corp., 5 F.3d 877, 891 (5th
20 Cir. 1993).

21 MHC should not be allowed to recover any copying costs on such a superficial request
22 that does nothing to show which copying costs are permitted under the statute and local rules.
23 MHC cannot simply lump all of its costs into a summary list and demand that the City pay. The
24 Court should deny any recovery of copying costs based on this record.

25 *d) Summary*

26 Like its request for 949,483.93 in categorically prohibited expenses, MHC's request for a
27 total of $325,630.66 for transcript, videography and copying costs is facially unreasonable,
28

contrary to law, and thoroughly undocumented. Because MHC has failed to make the required showing, these costs too should be rejected in their entirety.

V. CONCLUSION

MHC had an obligation to submit a properly documented, reasonable fee and cost request. Instead, MHC has plainly piled on every possible fee and expense it can devise, and then requested a *premium* above what it actually spent, with no regard to the governing legal standards, the need for proof, or basic concepts of fairness and proportionality. The Court is left with no basis to grant either fees or costs, and should deny MHC's request in its entirely or, alternatively, either (1) simply offset each side's fees and costs, or (2) and upon an appropriate public evidentiary showing, limit MHC to reasonable contemporaneous *Laffey* rates for a reasonable amount of time spent prosecuting the claims it won, and to the minimal costs related to those claims whose recovery is permitted by statute.

Respectfully submitted,

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