

NEAL E. COSTANZO
MICHAEL G. SLATER

LAW OFFICES
COSTANZO & ASSOCIATES
A PROFESSIONAL CORPORATION
575 E. LOCUST AVENUE
SUITE 115
FRESNO, CALIFORNIA 93720-2928
(559) 261-0163

FAX (559) 261-0706

April 9, 2025

Via Mail and Email: fernando@cityofselma.com
Fernando Santillan, City Manager
City of Selma
1710 Tucker Street
Selma, California 93662

**Re: April 15, 2025, Closed Session Agenda Item for Public Employee Discharge,
Dismissal, Release**

Dear City Manager Santillan:

I have requested the inclusion on the closed session agenda a public employee evaluation of your position and a consideration of "public employee discharge/dismissal/release". The latter item pertains to you as well.

Because the Council is considering the aforementioned item in closed session, and is doing so based upon what amount to specific complaints or charges brought against you by another person or employee, I am providing you with notice of the following:

1. That the complaints or charges against you the City Council intends to hear are those set forth in the attached Memorandum to the City Council concerning the results of the independent investigation commissioned by resolution adopted January 21, 2025; and
2. You have the right to have the complaints or charges heard in an open session rather than in a closed session.

If you have any questions concerning the foregoing, please do not hesitate to contact me.

Very truly yours,

COSTANZO & ASSOCIATES


Neal E. Costanzo

NEC/js

MEMORANDUM

TO: The Mayor and Members of the City Council of the City of Selma

FROM: Neal E. Costanzo, City Attorney; John Kunkel, Independent Investigator

RE: Determination from Investigation of Conduct of City Staff on December 12 and 19, 2024, and January 21, 2025, City Council Meeting; and Settlement Agreement and General Release Between City Manager Fernando Santillan and City of Selma

DATE: April 9, 2025

I. INTRODUCTION

The resolution authorizing an independent investigation provides that the City Attorney is directed to provide legal service, advice and consultation to the investigator John Kunkel (Kunkel) as requested by him and as necessary to perform the investigator's duties. The resolution authorized an investigation into (1) the conduct of City staff including the Selma Police Department and City Manager's Office in connection with the City Council Meetings occurring on December 12 and 19, 2024, and on January 21, 2025; and (2) all matters relating to the making and basis for the City Council approval and the performance of the Settlement Agreement and General Release between the City of Selma and Fernando Santillan as City Manager approved by the City Council on May 20, 2024.

Early on in the investigation, it became clear that while there are discrete factual determinations that need to be made in order to determine the propriety of the conduct of City staff at the City Council meetings of December 12 and 19, 2024, and on January 21, 2025, as well as the matters relating to the basis for the City Council approval of the Settlement Agreement with the City Manager, the legal issues clearly predominate. Accordingly, and in compliance with the City Council's resolution authorizing this investigation, the determinations from that investigation which appear below are made primarily by the City Attorney, with the input of the independent investigator relative to facts discovered by him in the course of interviewing City staff members and obtaining documents. The matter of the Settlement Agreement is discussed first, below, and the events occurring on December 12 through January 21, 2025, are addressed second.

II. INVALID EXECUTION OF AGREEMENTS

A. THE REVISED EMPLOYMENT AGREEMENT APPROVED BY THE CITY COUNCIL ON FEBRUARY 6, 2023, AND THE SETTLEMENT AGREEMENT BETWEEN THE CITY AND FERNANDO SANTILLAN ARE SIGNED BY THE MAYOR PRO TEMP, ALTHOUGH THE MAYOR WAS NEVER ABSENT, AND ARE, FOR THAT REASON, VOID AND HAVE NO EFFECT WHATSOEVER.

The original Employment Agreement entered into between the City and Fernando Santillan on December 8, 2021, is attached as Exhibit A. The document is signed by the Mayor and was approved by Council. It provides for a three-year term concluding December 7, 2024, and sets Santillan's salary for year one at \$188,000, at year two, \$197,000 and year three at \$207,000. It provides the City may terminate the agreement for cause for refusing or failing to carry out the duties of the City Manager by service of a 30-day advance written notice in which event no severance is payable. It further provides that a severance is payable if the contract is terminated without cause and sets that severance payment as equal to nine months base salary.

The revised Employment Agreement, which is undated but which was approved by the City Council on February 6, 2023, provides that Santillan's base salary for the first year is still \$188,000, but that his salary in the second year (December 8, 2022 to December 7, 2023) is increased to \$220,500 and is for a term of six years beginning December 8, 2021, with the base salary in the sixth year being \$268,019. The revised agreement requires a four-fifths vote to terminate for failing or refusing to carry out the duties of City Manager, in which event the employee is not entitled to any severance pay and also provides that if the agreement is terminated without cause, the City pays an 18-month severance. The revised agreement includes the following provision at Section IV (D):

"Constructive Termination. Substantial interference by the Mayor and City Council, or any member thereof, with the City Manager's ability to perform material requirements powers and duties set forth in Municipal Code Chapter 18 and in accordance with Section XI below, will constitute a constructive termination of [sic] the discretion of the City Manager. Upon the occurrence of a potential interference, Employee will provide written notice of the conduct to the Council and City Attorney, should said interference continue following written notice, a constructive termination will be deemed to have occurred. Constructive termination, as defined herein, shall be considered a breach of this agreement and employee will be entitled to 18 months' severance pay as compensation for said breach. Severance pay in these circumstances shall be based on the salary payable to the employee in Year Six of this agreement. (i.e. salary at full contract term").

Section XI of the revised employment agreement includes the following provisions:

(a) The Mayor and City Council shall not interfere with the daily operations and personnel management and/or actions of the City Manager. The Mayor and City Council shall not make any attempt to gain confidential personnel information on any current, former or prospective employee/applicant by any means including but not limited to, by contacting current employees under the supervision of the City Manager.

(b) The City Council and its members shall deal with the administrative services in its city only through Employee, except for purposes of inquiry. Inquiry shall be limited to non-confidential public information which would normally be disclosed

to any member of the public during the normal course of the City's business. In no event shall inquiries be made in violation of subsection (a) of this section XI.

(c) Any discussion of the City Manager's performance shall only occur in closed session and a properly noticed City Council meeting.

(d) Consistent with applicable law, City shall refrain from subjecting the City Manager to a hostile work environment and/or harassing behavior, including by members of the public or any agent, relative or representative of any member of the City Council".

The revised agreement approved by a 3-2 vote of City Council on February 6, 2023, is attached as Exhibit B. The revised agreement, greatly enhances the City Manager's compensation and job security and is signed by Beverly Cho in her capacity as Mayor Pro Temp. The Mayor voted against approval of this agreement, and he refused to sign it.

The Settlement Agreement approved by the City Council on May 20, 2024, by the three member majority is also signed by Beverly Cho as Mayor Pro Temp. The Mayor was not at any time "absent". The Mayor actively refused to sign either the amended contract or the Settlement Agreement.

In *Torres v. City of Montabello* (2015) 234 Cal.App.4th 382, a city resident filed a petition for writ of mandate seeking to invalidate a waste hauling contract signed by the Mayor Pro Temp rather than by the Mayor who had refused to sign the contract. The Court of Appeal upheld a trial court's order issuing the writ. The City of Montabello, like Selma, is a general law city. General law cities are required to comply with state statutes that specify requirements for entering into contracts. (234 Cal.App.4th at p. 394). Government Code §40602 allows the City Council to provide by ordinance that a contract be signed by an officer other than the Mayor. Montabello had no such ordinance. Neither does Selma. Absent such an ordinance, the statute requires that the Mayor "shall sign" . . . "all written contracts . . . entered into by the city".

The Court of Appeal in *Torres* held that this provision of the Government Code prescribes the only method by which the City can enter into a contract. (*Id.* p. 396).

§40601 of the Government Code authorizes the Mayor Pro Temp to execute a contract requiring the Mayor's signature "in the absence of the Mayor". Selma Municipal Code (SMC) 1-7-2 provides that the "Mayor Pro Temp shall have all the powers and duties of the Mayor in the absence of the Mayor". The *Torres* court held the word "absence" as used in §40601 and in a corresponding city ordinance allowing the Mayor Pro Temp to execute a contract requiring the Mayor's signature in the "absence" of the Mayor were limited to the situation in which the Mayor was "physically absent". (*Id.* at p. 397).

The *Torres* court rejected the argument that the Mayor could be treated as being absent so as to allow the Mayor Pro Temp to execute the agreement when the Mayor

refuses to sign. The court held that the remedy of the majority of the City Council was to seek an order under CCP §1085 compelling the Mayor to perform his mandatory ministerial duty of executing the waste hauling contract. Of course, pursuing that avenue would permit the Mayor to raise illegality of the agreement or other impropriety on the part of the majority of the City Council as a defense in any such proceeding. Because the City could not circumvent the Government Code's prescriptions by simply deeming the Mayor absent on their own unilateral determination, the waste hauling contract that was not signed by the Mayor was void.

Because the City Council in that case had failed to conform to the competitive bidding requirements of the Public Contracts Code in awarding the waste hauling contract, the Appellate Court held that it could not compel the Mayor to execute the agreement that had been approved because it could not compel an unlawful act. Consequently, because the waste hauling contract in that case was not executed by the Mayor the contract was void. The statute prescribes the only method by which a valid contract can be made and compliance with the prescribed mode of contracting is a jurisdictional prerequisite to the exercise of the power to contract by the City.

A void contract is ineffective for any purpose and the City can recover any and all consideration paid by it pursuant to any void contract. Accordingly, Selma is plainly entitled to recover from Santillan the additional amounts paid to him under the Amended Employment Agreement. Santillan's Employment Agreement expired December 7, 2024. The Settlement Agreement is void for the same reason.

III. VIOLATIONS OF GOV.C.§1090

A. BOTH THE SETTLEMENT AGREEMENT AND AMENDED EMPLOYMENT CONTRACT VIOLATE GOVERNMENT CODE §1090.

Both the Amended Employment Contract for the City Manager adopted February 6, 2023, and the Settlement Agreement adopted May 20, 2024, are contracts specifically prohibited by Government Code §1090 because they are contracts made by the City Manager in his official capacity with the City of Selma in which the City Manager is financially interested.

(1) Legal Principles Relating to Government Code §1090.

Government Code §1090 provides, in part, that City officers or employees shall not be financially interested in any contract made by them in their official capacities". The courts have held that:

"The evil to be thwarted by §1090 is easily identified. If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality. Where public and private interests diverge, the full and fair representation of the public interest is jeopardized".

(*Lexin v. Superior Court* (2010) 47 Cal4th 1050, 173; *People Ex Rel Harris v. Rizzo* (2013) 241 Cal.App.4th 921, 948).

There are exceptions to rule. For example, an officer or employee is not deemed to be interested in a contract if his or her interest is only "that of an officer and being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties". (Govt. Code §1091.5(a)(2)). A different exception is known as the "government salary" exception (§1091.5(a)(9)). Further, officials are sometimes permitted to negotiate contracts affecting their own salaries under a common law "rule of necessity". (*Lexin, supra*, 47 Cal.4th at p. 1085). The Supreme Court, has expressly held, however, that the exception of 1091.5 (a)(9) providing that an officer or employee is not deemed to be interested in a contract if his or her interest is only that of a person receiving salary, per diem or reimbursement for expenses from a government entity was "never intended to permit government officials to negotiate prospective changes in their own government compensation" (*Lexin, supra*, at p. 1085).

(2) Prohibited Financial Interest.

The term "financially interested" is not defined by §1090. The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interest the official is charged with protecting. The statute prohibits any form of pecuniary interest that has the potential to deprive the people of an official's overriding fidelity to them and places the official in a compromising situation where the exercise of his official judgment or discretion may be influenced by his personal considerations rather than the public good. (*Lexin, supra*, 47 Cal.4th at p. 1075). §1090 is intended to require public officials to "avoid the conflict that is created when public officers or employees stand to receive pecuniary benefits from transactions made by them in their official capacities so that the official has a prohibited pecuniary interest if "he might profit" from the transaction. (*Id.*).

(3) The "Government Salary" Exception to 1090.

The exception provided by §1091.5(a)(9) for a person receiving salary, per diem or reimbursement for expenses from the governmental entity was, as noted, "never intended to permit government officials to negotiate prospective changes in their own government compensation". (*Lexin, supra*, 47 Cal.4th at p. 1085). At issue in *Lexin* were agreements by which the board that administered the City's retirement system agreed to allow the City to limit its funding of the retirement system in exchange for the City's agreement to provide increased pension benefits to City employees, including the board members. (*Id.* at p. 1062). The court concluded that the exception of Government Code §1091.5(a)(9) "was intended to apply to situations where the body or board of which an official is a member is contemplating a contract with – or on behalf of – a governmental entity for which the official also works". (At p. 1079). If "a contract an official considers in his or her official capacity is with the official's government employer and involves direct

financial gain, the official is prohibited from participating under §1090. If the contract involves no direct financial gain, and does not directly affect the official's employing department, the interest is minimal or a non-interest under §1091.5(a)(9) and no conflict of interest prohibition applies. (*Id.* at p. 1081).

In *Lexin* the Supreme Court rejected the Defendant's argument that Government Code §1091.5(a)(9) "insulates any interest so long as it is an interest in government salary" as "considerably too broad". Such an interpretation would permit board members to freely select and hire themselves out into new government positions, or to act in their official capacities to modify their own individual salaries without resort to the rule of necessity. "This is not now and never has been the law". (*Id.* at p. 1084, fn 15). Indeed the court rejected the assertion that this subdivision permitted Defendants to negotiate changes to their own pension plans. "Direct changes to personal compensation do not come within the exception for existing interest in government salary in the first instance. (*Id.* at p. 1085; *People Ex Rel Harris v. Rizzo* (2013) 214 Cal.App.4th 921).

(4) Facts Established by Investigation of Revised Employment and Settlement Agreements.

The underpinnings of both the revised Employment Agreement and Settlement Agreement arise from the City Council's meeting on April 4, 2022. At that meeting, two speakers addressed the City Council about the City Manager's demotion of the Public Work's Director, Shane Ferrell (Ferrell). Joan Nelson (Nelson) plainly directing her comments to City Council members Mendez-Navarro, Cho and Trujillo, stated that the City has "turned into a ghetto and is being run like Parlier". "It seems the only people you are hiring are part of your plan. There is three of you up there that have a plan".

Yolanda Torres singled out Santillan asking what are the "City Managers" "qualifications" and comparing Santillan to Ferrell stating "you haven't been here long enough" and "you've never been a City Manager before so what qualifies you to sit up there and turn our City around and make decisions like this? . . . I'm [going to] bring in the media, I'm [going to] try and see what your qualifications are to even see if you're qualified to be sitting in that seat because I don't think you are".

On April 18, 2022, at the next City Council meeting in closed session, Santillan presented a written complaint complaining that the Mayor failed to prevent Nelson and Torres from speaking to "protect staff from potential harassment, bullying and exposure to a hostile work environment, with the basis of the harassment being discrimination on the basis of [his] ethnicity". In the written complaint submitted to the City Council he states the Mayor's failure to stop Torres and Nelson from speaking was a "clear breach of the Mayor's duty as Chair of the meeting and the Council's responsibility to protect City employees from discrimination, harassment, bullying and a hostile work environment". In the written complaint, Santillan states that he is "currently deciding" whether to file a complaint with United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing (Now

Department of Civil Rights) and states that "I WILL NOT tolerate discrimination or harassment of any kind either against myself or any member of my staff". "Further, I am requesting that the Council direct the City Attorney to engage me in a renegotiation of my contract to incorporate language which protects me from further harassment of this sort and other potential revisions as proposed".

Santillan gave an interview to attorneys "investigating" a claim, coincidentally presented by the Mayor on February 6, 2023, in which he describes what occurred in the closed session on April 18, 2022. In response to his complaint the three member majority decided to "revise [his] contract to add language to protect [him] from further instances" of that nature. Santillan testified that following the April 18 meeting "we came back in August with revisions, after [he] had worked with the City Attorney on revisions to [his] agreement". Santillan claims that at a closed session meeting in August 2022, "the Mayor retaliated against [him] for making this complaint". The retaliation consisted of the Mayor's statement, also made in closed session, that he would "sue [Santillan] for slander if Santillan made the complaint to the Civil Rights Department. Santillan testified to the "investigators" as follows:

"Q. One clarifying question you mentioned earlier that they, being the majority of the City Council, suggested that your contract be amended to include some protection of you, who made that suggestion?

A. Well, it was my suggestion, it was my request and the Council agreed with it".

...

Q. And then has your agreement recently been amended or extended?

A. It has. The last revision was on February 6th, which coincidentally is the date of the Mayor's complaint against me.

Q. And what, if any of the . . . terms of it were changed?

A. Yeah, it's pretty significant things. First of all, my pay was increased, my base salary. There was a provision added that in order to terminate me it would require a four-fifths vote. Supermajority of the Council. And then also the other main point was that my severance was extended from nine months to eight months."

All the foregoing facts are apparent from written documents included in the report by Bridget Hanson, the "investigators" that were hired to investigate the Mayor's complaint of February 6, 2023.

On February 6, 2023, the Mayor submitted what is expressly characterized as a "claim by [him] against the City for harassment and retaliation by City Manager

Santillan". The claim seeks, among other things, monetary damages. The Mayor requested that the "matter" appear on the next City Council Agenda as a closed session "anticipated litigation" item. The claim concludes that the "consequences" of the City Council not meeting the demanded terms would result in the Mayor taking legal action.

On March 6, 2023, the City Council, with the Mayor abstaining, rejected the Mayor's claim and written notice of that formal rejection was subsequently provided by the City Attorney on March 28, 2023. However, Robertson had formally withdrew his claim on March 24, 2023. The City Attorney plainly recognized the Mayor's claim for what it was, a claim under the Government Claim's Act. The attorney states in her March 28, 2023, letter to the Mayor that he has "six months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code §945.6". The statement is an accurate statement of law and clearly the statute of limitations on any suit by Mayor Robertson based on this claim would have expired six months after March 28, 2023, on September 28, 2023.

Despite the Mayor's withdrawal of his claim, the City Council on June 19, 2023, voted 3-2 to hire Bridget Hanson to conduct an investigation of the Mayor's claim. The report on that investigation is dated October 23, 2023, after the statute of limitations would have run on the Mayor's claim. Given the Mayor's prior withdrawal of the claim and the fact that the statute of limitations would run approximately two months after referring the investigation to Bridget Hanson, there appears to be absolutely no rational basis for pursuing this investigation. After the claim was withdrawn, there was no prospect of litigation and certainly that prospect had been entirely eliminated by passage of the statute of limitations on September 28, 2023.

Meanwhile, on March 20, 2023, Santillan filed a complaint against the City with the California Civil Rights Department in Case No. 202210-1840800 alleging its elected officials engaged in discrimination and harassment of Santillan on the basis of race and national origin and engaged in retaliation based on Santillan race or ethnicity. The complaint is based entirely on the statements made by Nelson and Torres in open session on April 4, 2022, and on Robertson's statement to Santillan in closed session that if he filed a complaint based on those charges the Mayor would sue him for slander.

In the claim, the Mayor complains about Santillan refusing to cancel a City Council meeting so that the Mayor and Council member Guerra could attend a prayer vigil scheduled for the same night as the Council meeting to honor a Selma Police Officer who was killed in the line of duty on January 31, 2023. At the following Council meeting, Guerra, according to Santillan's statement to the investigator's, reprimanded him in public during that Council meeting for refusing to cancel the prior City Council meeting which Guerra did not attend because she was attending the prayer vigil for the fallen officer.

On June 13, 2023, Santillan filed a complaint against Selma alleging retaliation for engaging in protected activity with the California Labor Commissioner's Retaliation Unit

is Case No. RCI-CM-961783. The complaint alleges that the comments found in Robertson's claim of February 6, 2023, relating to the refusal of the City Manager to cancel a City Council meeting so that Council could attend the prayer vigil for the fallen officer was in a fact a "written warning" or "reprimand" and the complaint also refers to the statement of Council member Guerra made in open session during a duly convened meeting as a "public reprimand in violation of [his] employment".

These are the two complaints settled by the Settlement Agreement. The Settlement Agreement recites that Santillan claims damages based on the allegations made in this two complaints consisting of "economic damages, emotional distress damages, punitive damages, penalties, liquidated damages, interest and attorneys fees".¹

In this investigation, Santillan was requested to produce multiple documents to Kunkel. Primary among those was all correspondence with the Employment Risk Management Agency (ERMA) concerning Santillan's claim. No such documents were produced. Kunkel interviewed the Administrative Services Director who stated that she filed the claim with ERMA by submitting the City Manager's complaints with the Civil Rights Department and Labor Commissioner to ERMA directly. The Administrative Services Director stated that she did have emails from ERMA but has not been able to locate them due to staff shortages and a new Microsoft 365 update. She stated that ERMA accepted the claims and assigned an attorney. At that point, all further communications were solely between the ERMA attorney and the City Attorney.

The attorney assigned by ERMA is named in the Settlement Agreement and is Mark Meyerhoff at Liebert, Cassidy & Whitmore. Meyerhoff was interviewed by your City Attorney. Meyerhoff met with the City Council on one occasion only. At that time he expressed extreme skepticism concerning the validity (or actually the patent invalidity) of Santillan's claims. He expressed that extreme skepticism directly to the City Council because the claim was based on statements made, and alleged failures by the Mayor and other City Council members in the course of public meetings, and in one case in the Mayor's claim under the Government Claims Act. After meeting with the City Council he was asked to draft the Settlement Agreement and to include in that Settlement Agreement the items requested by the City Council. The request from the Council came to Meyerhoff through the then City Attorney Crouch.

Meyerhoff had numerous exchanges with Crouch concerning the Settlement Agreement that she told him had been specifically requested by the City Council. He specifically told Crouch that a unanimous vote provision for termination in the Settlement Agreement would be illegal.² Meyerhoff repeatedly stated his position to Crouch that the terms of the Settlement Agreement were "unreasonably generous"

¹ Cities are plainly not subject to punitive damages (Gov.C. §818) and there is no basis for claiming liquidated damages.

² In its Resolution No. 2025-06R by a four-fifths vote this Council voted to rescind an addendum to Santillan's employment agreement based, primarily, on the fact that this unanimous vote requirement for termination is contrary to law, all of which is detailed in that resolution.

given the likely lack of any merit of Santillan's claim. He specifically referred Crouch to case law applying the privilege provided for by Civil Code §47(b) which makes all conduct or communications occurring in connection with a City Council meeting or in anticipation of litigation privileged and not actionable for any purpose, including a discrimination or retaliation claim. He referred Crouch to *Brown v. Department of Corrections* (2005) 132 Cal.App.4th 520 which holds the statutory privilege for statements made in any public or official proceeding authorized by law are absolutely privileged and bars all forms of liability based on those statements. *Brown* involved a claim under Labor Code §1102.5 for retaliation, the precise claim Santillan made in his complaint with the Labor Commissioner.

Meyerhoff was not attending to any active litigation but rather simply conforming to Crouch's request for preparation of a Settlement Agreement reflecting specific terms that she said the City Council had already agreed to, including the payment to Santillan of a damages award of \$350,000, the five-year extension of his Employment Agreement, associated enhancements in salary, and inclusion of all of the terms that were found in the addendum the Council has now rescinded to include the patently unlawful 5-0 vote requirement for termination of Santillan.

(5) Privileged or Protected Conduct that Cannot Form the Basis of a Claim.

Santillan's claims with the Labor Commissioner and the Civil Rights Department are baseless.

Civil Code §47(b) creates a privilege which immunizes anyone from liability for any communicative, or non-communicative act related to the communicative act, that arises in the course of litigation or any legislative or other official proceeding authorized by law. (5 Witkin Summary of Law, Torts, Section 660-689). These are known as the "litigation" and "legislative privileges".

Communications preparatory to or in anticipation of bringing an action (lawsuit) or other official proceeding are privileged and cannot serve as the basis for any claim or cause of action even if the communication is made with malice, the intent to harm, or is perjurious or unlawfully discloses confidential information. (*Timothy W v. Julie W* (2022) 85 Cal.App.5th 648, 662-663; *Garagos v. Abelyan* (2023) 88 Cal.App.5th 1005, 1031). This is the "litigation privilege".

A different privilege provided for by the same section declares absolutely privileged any publication made in any legislative proceeding and is "broad and comprehensive including proceedings of all legislative bodies whether state or municipal and specifically applies to statements made to a city council in connection with their open session proceedings or statements made by city council members in open session or in closed session proceedings which are all authorized by law, specifically the Brown Act. (*Rizzo, supra*, 214 Cal.App.4th at p. 944; *Midland Pacific Building Corporation v. King* (2007) 157 Cal.App.4th 264, 273-274; *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 413).

The statement made by Robertson in his February 6, 2023, claim concerning the refusal of Santillan to cancel a City Council meeting is a statement that is protected by the litigation privilege because it is a prelitigation statement made in anticipation of litigation. Guerra's statement made during an open session meeting relating to the same complaint against Santillan is protected by the legislative privilege. Neither statement can form the basis of any claim or cause of action. Consequently, Santillan's complaint with the Labor Commissioner is plainly barred under the authority cited by Meyerhoff to Crouch and his complaint of discrimination and harassment based on the statements of Torres and Nelson made during an open session meeting are plainly barred by the legislative privilege.

Further, as a prerequisite to any suit against the City Santillan would need to make a claim under the Government Claims Act, something he never did. His claim is not exempt from this requirement even though claims by public employees for fees, salaries and expenses are expressly exempted from the general claims procedures. (Govt. Code §905(c). The exemption does not apply to a claim for damages, only earned but unpaid salary or wages. (*Hanson v. Garden Grove Unified School District* (1982) 129 Cal.App.3d 942, 946).

(6) Conclusion and Remedy.

It is crystal clear that the revised Employment Agreement and Settlement Agreement are contracts made by Santillan with the City of Selma in his official capacity in which Santillan is directly financially interested. The government salary exception of 1091(a)(9) does not apply because the revised employment agreement and settlement agreement both create a direct financial, pecuniary interest in the contract. (*Thompson v. Call* (1985) 38 Cal.3d 633, 645). Contracts in violation of Section 1090 are void from their inception. (*Id.* p. 646). The fact that they are void anyway because they are signed by the Mayor Pro Temp makes no difference. Section 1090 makes the contract void from its inception. Consequently, a void contract can be a "contract" within the meaning of §1090.

The City is entitled to recover all consideration paid under the void contracts without restoring any benefits that it has received under the contract and if the violation is willful, the making of the void contract is a crime. (*Id.*) Because both the Settlement Agreement and revised Employment Agreement are made in violation of Government Code §1090, they are both void and were so from their inception. Consequently, the only valid contract of employment Santillan had with the City has expired as of December 8, 2024. There is no requirement for the payment of severance in the event of a termination and no requirement that there be any good cause for termination in order to avoid severance. Santillan serves at the will of the City Council.

In connection with the discussion of the events of December 12, and following, addressed below it appears Santillan has taken actions that defy directives of the City Council and which are unauthorized. Those acts are indicative that his primary interest

is in benefitting himself financially, to the great disadvantage of the City of Selma because of the conflict of interest created by these illegal agreements. Given that the contracts create a presumptive conflict of interest and jeopardize full and fair representation of the public interest, the appropriate agenda items at which the council can consider termination of the City Manager will appear on the April 15, 2025, agenda. The City Council members also have a fiduciary obligation to seek the return of money paid out in connection with the revised Employment Agreement and Settlement Agreement. Because it is unlikely the City will gain recovery of what it paid under the illegal contracts from Santillan, it is recommended that the City Council authorize suit against Crouch and her law firm for malpractice. The violation of 1090 appears willful and the Council has the opportunity to refer Santillan for criminal prosecution. Because the Mayor and Member Guerra reported the making of the Settlement Agreement to the Fresno County District Attorney's Office, specifically, Victor Lai, and Victor Lai refused to pursue the matter, it is recommended if the Council is inclined to make a referral of criminal charges that the referral be made to the Attorney General's Office.

IV MEETINGS OF NEWLY INSTALLED COUNCIL

Although the investigation is of three meetings, the most problematic is the meeting that occurred on December 12, 2024.

A. NO DETERMINATION OF RESPONSIBILITY FOR INTERFERING WITH THE DECEMBER 12, 2024, MEETING IS MADE BECAUSE THAT DETERMINATION SHOULD ONLY BE MADE BY A CITY MANAGER.

After being unsuccessful in attempts to have the City Council set a meeting on or prior to December 16, 2024, the next regularly scheduled meeting date fixed by ordinance, the Mayor announced that he was setting a special meeting for December 9, 2024, and provided a proposed agenda which included declaring the results of the election of November 5, 2024. Staff refused to publish such an agenda because the Planning Commission meeting was set for that date. After attempting to set a special meeting for the following date, the Mayor accommodated a request by Crouch to set the meeting for December 12, 2024, and an agenda was duly published which included adoption of the Resolution declaring the results of the election.

Although requested, no resolution declaring results of the election was provided to the City Council before or at the Special Meeting. In accordance with Government Code §54955, after noting no quorum was present, the Mayor adjourned the meeting and ordered that it be reconvened at 6:07 p.m. The Mayor administered the oath of office to member Ocegerra and Avalos and as he did, the City Attorney stated that he could not do so because the Elections Code required that the City Council first adopt a resolution declaring the results of the election. After Ocegerra and Avalos were sworn, the City Council conducted its meeting. The two members were re-sworn along with Robertson by the Chairman of the Board of Supervisors. The Council tabled adoption of the Resolution declaring the election results because no resolution had been provided

to them as required leaving the only actions in open session various City Council assignments.

As Avalos and Ocegüerra were being sworn into office by the Mayor during the recess, Crouch and the Deputy City Manager left the Council chambers. The City Clerk was instructed to and did discontinue the live stream of the meeting and left City Hall.

Because the interior doors to Council Chambers were locked, the Council was forced to direct the members of the public to wait in the lobby while they conducted their closed session. The Police thereupon directed multiple members of the public to leave City Hall and directed the City Council to disband its closed session meeting and leave City Hall as well. When the officers met resistance, they relented and allowed the City Council five minutes time complete their closed session meeting, but still required the public to wait outside for the Council to emerge. The City Council was escorted out of City Hall where they announced the results of their closed session to terminate the prior City Attorney and appoint a new one.

At 6:14 p.m. while the City Council meeting was ongoing, Crouch emailed the Mayor and all Council members, copying the City Manager stating that Robertson and Guerra had intentionally violated Elections Code §10263 which prohibited them from installing the new Council members until the currently installed Council members adopted the Resolution reflecting the results of the election. She states in the email that the violation of the Elections Code is also an intentional violation of the Brown Act "which can be prosecuted criminally".

The Deputy City Manager stated in an interview with the investigator that he directed the Police to go to City Hall to shut down the City Council meeting and City Hall and that he was not directed by anyone to do so. He stated that he left the meeting when the City Attorney stated the meeting could not proceed and the City Attorney left the meeting. The Deputy City Manager telephoned the Chief of Police and the City Attorney was on that telephone call. The Chief referred the matter to Sargent Guzman, the Watch Commander. He told Guzman to give it some time to let the emotions simmer (45-60 minutes) when he responded to City Hall. He spoke to Guzman during the evening to check on status. No one communicated with the City Manager concerning the report to the police.

1. Applicable Law.

City Council meetings are the focus of highly important individual and governmental issues. Citizens have an enormous First Amendment interest in directing speech about public issues to those who govern their city. Such meetings are, consequently, public forums, although limited ones". (*White v. City of Norwalk* (9th Cir.1990) 900 F.2d 1421, 1424). City Hall is not a traditional public forum in the sense that a street or sidewalk may be, but a limited public forum in which Council can engage and exercise their rights of free speech and assembly along with the public in connection with carrying out the City's general operations. City Hall and the Council

Chambers are public property available for the exercise of free speech and rights of assembly and petitioning the government for redress of grievances which all persons have a Constitutional right to use for its intended purpose. (*Albertsons Inc v. Young* (2003) 107 Cal.App.4th 106, 118-119).

The state and a city, no less than a private owner of a property, has the power to preserve the property for the use to which it is lawfully dedicated. But persons present on state or city property are entitled to use the city property to engage in the type of free speech and association activities for which City Hall is dedicated. (*Id.*).

Penal Code §403 provides that every person who, without authority of law, willfully disrupts or breaks up any assembly or meeting that is not unlawful in its character is guilty of a misdemeanor. An assembly is only unlawful if the assembly is to perform an unlawful act or a lawful act in a violent, boisterous or tumultuous manner. (Penal Code §407). Civil Code §52.1 provides that any person, whether or not acting under color of law, who interferes or attempts to interfere by threats, intimidation or coercion with the exercise by any individual or individuals of rights secured by the Constitution and laws of the United States is subject, alternatively, to either a civil action by the Attorney General or District Attorney to impose a civil penalty of \$25,000 or a civil action for unlimited damages and injunctive relief by the person who's rights have been interfered with. There is a federal statute (28 USC §1983) which imposes the same liability in favor of the person who's civil rights are violated by a person acting under color of law.

2. Conclusions on responsibility for violations of civil rights.

The Penal Code provisions require willfulness and that the interference with one's Constitutional rights be "without authority of law". In virtually every context in which civil or criminal liability is imposed, there exists an affirmative defense that the person has relied on the advice of an attorney. Although the Deputy City Manager determined to summon the Police and the Chief of Police responded to that summons by sending Sergeant Guzman, the Deputy City Manager and Chief of Police may have been taking that action in response to Crouch's claim that the meeting was unlawful. Laypersons are entitled to rely on the opinions of attorneys. If they do, they cannot be held liable, nor can a city be held vicariously liable for a violation of civil rights. (*State Farm Mutual Auto Insurance Company v. Superior Court* (1991) 228 Cal.App.3d 721, 725-727).

The person that can be held civilly or criminally responsible for a violation of civil rights by a layperson, by essentially ejecting the public and the City Council from City Hall and thereby interfering with a lawful assembly and meeting is the attorney that gave the bad advice, Crouch. The Deputy City Manager or Chief of Police may have believed they had the "authority of law" to take that action. They were entitled to rely on the advice of the person they believed to be the City Attorney. Further, neither the Chief of

Police or Deputy City Manager, or the officers involved engaged in any threats, intimidation or coercion within the meaning of Civil Code §52.1.³

Any determination that an employee bears any form of responsibility for a violation of civil rights should only be made by a City Manager because only a City Manager has supervisory authority over the employees. Making the determination requires an assessment of exactly what the employee understood the City Attorney was telling him and an evaluation at the employee's "good faith" belief. These are determinations better made by an employee's superior, not an elected City Council.

B. THE CITY MANAGER ACTED IN EXCESS OF AUTHORITY AND FAILED TO PERFORM THE DUTIES OF THE CITY MANAGER ON AND PRIOR TO THE JANUARY 21, 2025, MEETING.

The Council is fully aware of what occurred on December 19 and January 21, 2025. It is also aware that the Fresno County District Attorney issued a December 17 letter parroting Crouch's erroneous legal opinion that the actions taken by the City Council on December 12, 2024, violated Elections Code §10263 and, by extension, the Brown Act because the failure to have the prior members adopt a resolution declaring the results of the election somehow meant there was no quorum on December 12, 2024. Of course, no one can or has ever attempted to explain how it is there was no quorum present when newly elected members had been duly sworn in by persons authorized to administer the oath of office.

The Mayor wrote the City Manager stating that he was calling a special meeting for December 19 to address the unfinished business of adopting the resolution declaring the results of the election. The City Manager agreed to issue an agenda for that special meeting but stated that he would be doing so with the roll call portion of the agenda identifying the two council members whose terms had expired, Cho and Mendoza-Navarro.

Trujillo, Mendoza-Navarro and Cho did not attend. When the roll call by the clerk failed to be answered by a quorum, the Mayor had a roll call conducted of the newly installed Council members and a quorum was deemed present. The City Council adopted the Resolution declaring the results of the election.

The District Attorney issued a letter in advance of the January 21, meeting stating that the District Attorney's Office did not believe there had been any violation of the Brown Act, acknowledging that the City Council had adopted the resolution called for by Elections Code §10263 and stating that his prior letter was being improperly extrapolated by unidentified persons. The Mayor corresponded with the City Manager advising him that under no circumstances should adoption of the same resolution

³ The advice of counsel defense is not available as a defense to an alleged knowing and willful, and therefore criminal violation of Gov.C. §1090. The officer need only be aware there is a reasonable likelihood that the contract he enters into may result in a personal financial benefit to him. (*People v. Chacon* (2007) 40 Cal.4th 558, 570-571).

appear on the January 21 agenda and that members Cho and Mendoza-Navarro should not be identified on any agenda for that meeting as City Council members. That correspondence replicates a directive by the four members present on December 19. The City Manager contacted Bridgett Hanson and, apparently, requested that they issue a memorandum expressing the opinion that the City Council could avoid the "risk" of having its prior actions set aside by having the former City Council adopt another resolution declaring the results of the election. The City Manager has no authority to retain the services of an attorney to advise the City Council. The memorandum provided by Bridgett Hanson yielded a more than \$21,000 invoice to the City. The Mayor and Mayor Pro Temp refused to sign a check in payment for the unauthorized expenditure.

Cho and Mendoza-Navarro attended the meeting, and the roll call on the agenda included their names as existing City Council members. The new City Council conducted the roll call of the newly installed City Council which removed from the agenda the adoption of the Resolution declaring the election results.

The City Manager's inclusion of Mendoza-Navarro and Cho on the roll call and including the adoption of a second resolution declaring the results of the election is a failure to perform the duties of the City Manager which include the creation of an agenda for a meeting of the City Council. The City Manager acted in excess of his authority retaining Bridgett Hanson to generate the avoidance of risk memorandum and may have caused a check to be issued in payment of the improper approximately \$21,000 invoice to that law firm.

V CONCLUSION

The City Manager's Employment Agreement amended February 6, 2023, and the Settlement Agreement both violate Government Code §1090. Because those contracts are void, there is no requirement of cause or reason for terminating the City Manager's employment. If there were, having a contract with the City in which the City Manager is financially interested clearly amounts to a failure to perform a central duty of the office of City Manager, to avoid financial conflicts of interest. The City Manager's actions in excess of authority with respect to procuring a legal opinion for the City and acting on that legal opinion which was contrary to the express position taken by the City Council amounts to failures and refusals to perform the duties of the office of the City Manager. The City should also consider pursuing Crouch for malpractice based upon her improper legal assistance provided in generating both the revised employment agreement and the settlement agreement. The City Council should defer any determination of responsibility for events of December 12, 2024, to a City Manager.