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11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

14 ANTHONY MARIO ASSENZA, *et al.*,

15 Plaintiffs/Petitioners

16 vs.

17 CITY OF LOS ANGELES, *et al.*,

18 Defendants/Respondents

19) **CASE NO.** BC 115813

20) [Assigned to Hon. Terry A. Green,
21) Dept. 14]

22) **DEFENDANTS' MEMORANDUM**
23) **OF POINTS AND AUTHORITIES IN**
24) **OPPOSITION TO PLAINTIFFS'**
25) **MOTION FOR ATTORNEYS' FEES**

26) **Date: January 16, 2013**
27) **Time: 8:45 a.m.**
28) **Dept: 14**

29 DEFENDANTS/RESPONDENTS (hereinafter Defendants) City of Los Angeles, Chief of
30 Police Charlie Beck and the Los Angeles Police Department (LAPD), hereby submit the following
31 Memorandum of Points and Authorities in opposition to Plaintiffs'/Petitioners' (hereinafter Plaintiffs)
32 Motion for Attorneys' Fees.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **INTRODUCTION**

3 The Plaintiffs filed a Motion for Order to Show Cause (OSC) re Contempt on or about
4 March 22, 2012, alleging that Defendants had violated the Third Amended Judgment of Declaratory
5 Relief filed on June 11, 2010 in this case (hereinafter *Assenza* Judgment), the Honorable Alan
6 Buckner's July 29, 1998 Order (hereinafter Buckner Order), and the Honorable Terry Green's July 6,
7 2011 Order (hereinafter Green Order). (Plaintiffs' Request for Judicial Notice (PRJN), Exhibits 1, 4
8 and 7.) Plaintiffs alleged that the *Assenza* Judgment, the Buckner Order and the Green Order
9 required Defendants to distribute the Carry Concealed Weapon (CCW) application and the LAPD
10 CCW policy (hereinafter CCW Materials) at the LAPD's 21 Area stations. Defendants filed their
11 opposition to Plaintiffs' motion on April 10, 2012. A hearing on Plaintiffs' motion was held on April
12 23, 2012, before the Honorable Joseph Kalin. After hearing arguments from counsel, Judge Kalin
13 granted Plaintiffs' motion and directed Plaintiffs' counsel to prepare a proper OSC re Contempt for
14 issuance by the court. The OSC Re Contempt was issued by the Honorable Terry A. Green on
15 August 31, 2012. (PRJN, Exh. 11.) Defendants filed their Response to the OSC Re Contempt on
16 October 17, 2012. (PRJN, Exh. 12.) A full hearing was held before the Honorable Terry A. Green
17 on October 24, 2012, at which time the Court found the Defendants not guilty of contempt.

18 Plaintiffs now attempt to re-litigate the contempt issue that the Court already ruled on
19 during the October 24th hearing and seek to recover attorneys' fees and costs with no legal basis.

20
21 **I.**

22 **PLAINTIFFS ARE COLLATERALLY ESTOPPED FROM**
23 **RELITIGATING THE COURT'S RULING THAT**
24 **DEFENDANTS ARE NOT GUILTY OF CONTEMPT**

25 A full hearing on the issue of whether Defendants were guilty of contempt was held by
26 this Court on October 24, 2012. The hearing came after Plaintiffs had filed voluminous documents in
27 support of their contentions that Defendants were guilty of contempt. At the October 24th hearing,
28 the Honorable Terry Green acknowledged that he had read and considered the Plaintiffs' motion and

1 supporting declarations and Defendants response to the OSC re Contempt. ((Defendants' Request for
2 Judicial Notice (DRJN), Exhibit A, 1:22-24, 2:19-21.) Very early in the hearing, Judge Green
3 identified the central reason why Defendants could not be found guilty of contempt:

4 THE COURT: I went back and reread that. I also reread my order, of
5 course, and reread some of the declarations submitted by the plaintiff. It's
6 the defense position that - - I believe, and correctly - - that contempt can
7 only be a clear violation of a Court order. . . . And contempt is very
8 difficult. As it should be. It's a quasi-criminal proceeding, although it's
9 called civil, because you are imposing sanctions on people. So I think the
10 defense is right when they say it has to be a clear violation - - intentional
11 violation of a clear Court order. . . . The only clear order was that it had
12 to be put on the Internet. And I guess the only dispute is - - it was put on
13 the Internet. . . . So I guess my - - as long as it was put on the Internet, I
14 don't know that the rest of the order was clear enough that I could hold the
15 City in contempt. What I suggest we do is make it clear, have time limits
16 so that all parties know what the score is.

17 (DRJN, Exh. A, 2:19-21; 3:1-27.)

18 The Court then moved on to consider how a citizen might be able to easily obtain
19 information about how to apply for a CCW permit. The Court considered the Defendants' suggestion
20 that the distribution of the CCW Materials be centralized at the LAPD's Gun Unit. Then Plaintiffs'
21 counsel informed the Court that Plaintiffs also were no longer interested in having the Area stations
22 distribute the CCW Materials. (DRJN, Exh. A, 10:27-28.) Recognizing the absence of any court
23 order specifically requiring Defendants to distribute the CCW Materials in a particular way (other
24 than posting them on the Internet), the Court asked Plaintiffs' counsel what kind of order Plaintiffs
25 desired.

26 THE COURT: What do you want me to do? What kind of order do you
27 want me to fashion to guarantee that citizens who wish to apply for CCW
28 can do so with only modest interference with their life? It will take some

1 interference, but modest interference.

2 (DRJN, Exh. A, 12:5-9.)

3 Acknowledging that the Defendants had complied with the only specific court order
4 relating to the distribution of the CCW Materials by posting them on the Internet, the Court explored
5 the possibility of ordering Defendants to install informational signs at the Area stations.

6 THE COURT: Here's what I suggest: As far as contempt goes, we all
7 seem to agree that it's on the Internet. . . . But why don't we just do this
8 - - I disagree that LAPD doesn't do signs. And I think we should have a
9 sign in the police station that says, "If you wish to have a carrying a
10 concealed weapon permit, you must file an application and go to this
11 address or/and to this Web site."

12 (DRJN, Exh. A, 14:5-25.) After LAPD Deputy Chief Kirk Albanese informed Judge Green that the
13 LAPD could post informational signs in Area stations if the court so ordered, the Court proceeded to
14 set forth the detail of its order regarding the posting of signs. The Court then returned to the issue of
15 attorneys' fees which Plaintiffs' counsel had raised earlier in the hearing.

16 THE COURT: So, now, what is the legal authority for awarding
17 attorneys' fees?

18 MR. DALE: It would be the contempt statute.

19 . . .

20 THE COURT: Okay. Well, I agree with you. I think that municipalities
21 and the police force can be held in contempt. . . . I think that
22 municipalities can be held in contempt. **But I'm not holding them in**
23 **contempt because they have complied with the only direct order,**
24 **which was putting it on the Internet. Everything else was kind of**
25 **squishy.**

26 (DRJN, Exh. A, 22:27-23:10.) Judge Green initially denied Plaintiffs' request for attorneys fees
27 because Plaintiffs had failed to give Defendants proper notice of the request. (DRJN, Exh. A, 25:2-8;
28 27:2-5.)

1 In returning to a discussion of the court's new proposed order concerning signage,
2 Judge Green reiterated that the absence of a specific court order precluded a finding of contempt
3 against Defendants.

4 I have made this order. And if there is a party that feels it is in error, well,
5 then, we have a procedure in place to seek appellate review. It is not a
6 procedure to fail to comply or to drag feet or whatever. I'm not saying
7 that happened. I'm saying when I read the declarations, I understand
8 that's what the plaintiff is thinking is happening, that there was not a good-
9 faith attempt. Now, **whether there was or wasn't, I don't care because**
10 **I don't think the order was specific enough to base a contempt on; so**
11 **I'm not even going to go there.**

12 (DRJN, Exh. A, 26:10-19.)

13 Plaintiffs counsel once again raised the issue of attorneys' fees and asked the Court for
14 permission to file a brief on it. Judge Green graciously agreed to allow Plaintiffs to brief the issue
15 but made it clear that this litigation could not "go on forever."

16 THE COURT: I understand. And **if the law provides in this instance,**
17 **under these facts, and under my ruling** for attorneys' fees, then,
18 obviously, that's what the law provides. And I will review that, hear
19 argument of counsel, and make a ruling. Which, again, if it is disagreed
20 with, you can seek appellate review. Of course, if you want to file
21 something - - I'll tell you what. We ought to have a sundown on this.
22 File something before the statement of 30 days of today's date. **I don't**
23 **want this thing to go on forever.**

24 (DRJN, Exh. A, 27:14-23.)¹

25 But instead of simply briefing the issue of whether Plaintiffs are entitled to attorneys'
26 fees under the contempt statute and the Court's finding that Defendants are not guilty of contempt,
27

28 ¹ Although Plaintiffs' brief regarding attorneys' fees should have been filed within 30 days of the October 24th hearing, counsels' Proposed Order lodged with the Court on November 8, 2012, erroneously provided for Plaintiffs' brief to be filed within 30 days of the date of the Order. The Order was signed by Judge Green on November 21, 2012; thus, Plaintiffs were generously given 58 days from the date of the hearing to file their brief.

1 Plaintiffs attempt to get the proverbial “second bite of the apple.” In the first 13 pages of their
2 motion, Plaintiffs’ attempt to re-litigate the Court’s ruling that Defendants are not guilty of contempt
3 by offering creative legal arguments and submitting additional unconvincing evidence. However,
4 Plaintiffs are precluded from re-litigating the contempt issue by the doctrine of collateral estoppel.
5 “Collateral estoppel, or issue preclusion, ‘precludes relitigation of issues argued and decided in prior
6 proceedings.’” *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 quoting *Lucido v.*
7 *Superior Court* (1990) 51 Cal.3d 335, 341. Additionally, none of Plaintiffs’ additional arguments
8 change the legal basis the Court relied upon to find the Defendants not guilty of contempt: the
9 absence of a “clear, intentional violation of a specific, narrowly drawn order.” *Wilson v. Superior*
10 *Court* (1987) 194 Cal.App.3d 1259, 1272-1273. Consequently, the first 13 pages of Plaintiffs’
11 motion must be disregarded because parties must be able to rely upon the finality of a court’s ruling.
12

13 II.

14 PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS’ FEES

15 BECAUSE THEY ARE NOT PREVAILING PARTIES

16 Plaintiffs seek an award of attorneys’ fees and costs under Code of Civil Procedure
17 section 1218(a) which states:

18 Upon the answer and evidence taken, the court or judge shall determine
19 whether the person proceeded against is guilty of the contempt charged,
20 and if **it be adjudged that he or she is guilty of the contempt**, a fine may
21 be imposed on him or her not exceeding one thousand dollars (\$1,000),
22 payable to the court, or he or she may be imprisoned not exceeding five
23 days or both. In addition, **a person who is subject to a court order as a**
24 **party to the action**, or any agent of this person, **who is adjudged guilty**
25 **of contempt for violating that court order** may be ordered to pay to the
26 party initiating the contempt proceeding the reasonable attorney’s fees and
27 costs incurred by this party in connection with the contempt proceeding.

28 (Cal. Civ. Proc. § 1218(a).) (Emphasis added.)

1 Plaintiffs obviously concede that they must be prevailing parties to legally claim
2 attorneys' fees. That is why they argue that "this Court **effectively held** Defendants in contempt" and
3 suggest that "Plaintiffs **should be considered** prevailing parties for purposes of Sections 1209(a)(5)
4 and 1218(a)." (Plaintiffs' Points and Authorities, 1:22-26.) (Emphasis added.) But as stated above,
5 this Court unequivocally ruled at the October 24, 2012 hearing that Defendants were not guilty of
6 contempt because they had not violated any specific, direct court order. (DRJN, Exh. A, 22:27-23:10;
7 26:10-19.) Because Defendants were not adjudged guilty of contempt, Plaintiffs are not prevailing
8 parties and they have no legal right to an award of attorneys' fees and costs.

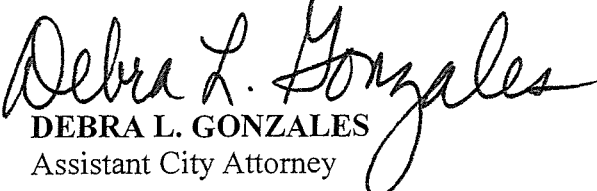
9
10 **CONCLUSION**

11 For all of the aforementioned reasons, Defendants respectfully request that this Court
12 deny the Plaintiffs' Motion for Attorneys' Fees.

13 DATE: January 7, 2013

Respectfully submitted,

14 **CARMEN A. TRUTANICH**, City Attorney
15 **CARLOS DE LA GUERRA**, Managing Assistant City Attorney
16 **DEBRA L. GONZALES**, Assistant City Attorney

17 By: 
18 **DEBRA L. GONZALES**
19 Assistant City Attorney

20 Attorneys for Defendants/Respondents

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 200 N. Main Street, City Hall East Room 800, Los Angeles, CA 90012.

On January 7, 2013, I served the foregoing document described as:

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

on the interested party(ies) in this action by placing the true copy(ies) thereof enclosed in sealed envelope(s) addressed as follows:

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BY MAIL – I caused each envelope with postage fully prepaid, to be placed in the United States Mail at Los Angeles, California. I thereafter caused such envelope to be deposited in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

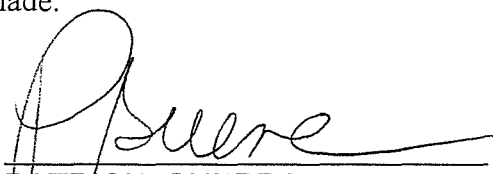
BY FACSIMILE TRANSMISSION – I caused such documents to be transmitted to the offices of the addressee via facsimile machine, prior to 5:00 p.m. on the date specified above. The facsimile machine I used was in compliance with Rule (2003(3), and the transmission was reported as complete without error. Pursuant to Rule 2008(e), I caused a copy of the transmission report to be properly issued by transmitting facsimile.

BY L.A. CITY ATTORNEY'S DOCUMENTS SERVICES – I caused each envelope to be delivered by the City of Los Angeles Document Services Department to the party served. The City of Los Angeles Document Service Department is located at 200 North Main St., 8th Floor, City Hall East, Los Angeles, CA 90012.

Executed **January 7, 2013**, at Los Angeles, California.

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

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction whose service was made.



PATRICIA GUERRA

US POSTAGE

2 \$32.30⁰⁰



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041L12202578

FROM:



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