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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

KIM BELEMJIAN; JONATHAN FAIRFIELD; T.J. JOHNSTON; MATTHEW PIMENTEL; STANLEY ROY; FFLGUARD, INC.; CALIFORNIA RIFLE AND PISTOL ASSOCIATION;

Plaintiffs,

vs.

KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; STEPHEN LINDLEY, in his official capacity as CHIEF OF THE CALIFORNIA DEPARTMENT OF JUSTICE BUREAU OF FIREARMS; CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-10,

Defendants.

CASE NO. 15-CE-CG-00029

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: December 16, 2015
Time: 3:30 pm
Dept.: 503
Judge: Honorable Alan M. Simpson

Action Filed: January 6, 2015

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NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on December 16, 2015, at 3:30 pm, or as soon thereafter as the matter can be heard in Department 503 of the above-entitled Court, located on 1130 O Street, Fresno, CA 93721-2220, Plaintiffs Kim Belemjian, et al., will and hereby do move for an award of attorneys' fees against Defendants Attorney General Kamala D. Harris, Chief of the California Department of Justice Bureau of Firearms Stephen Lindley, and the California Department of Justice.

The motion is brought pursuant to Code of Civil Procedure section 1021.5 and rule 3.1702 of the California Rules of Court, on the grounds that (1) Plaintiffs are the prevailing parties having served as the catalyst for Defendants' voluntary acquiescence to the requirements of the Administrative Procedure Act; (2) they enforced an important public interest; (3) they conferred a significant benefit upon the public; (4) the necessity and financial burden of private enforcement makes such award appropriate; and (5) the fees Plaintiffs incurred in obtaining relief in this action are reasonable and fully recoverable.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support, exhibits "A-U" and the declarations of C.D. Michel, Joseph A. Silvoso, Sean A. Brady, Anna M. Barvir, Margaret E. Leidy, Matthew D. Cubeiro, Laura L. Quesada, Michael S. Helsley, Kim Belemjian, Jonathan Fairfield, T.J. Johnston, Stanley Roy, Christopher Chiafullo, Steven Dember, Tom Pedersen, and Edward Worley filed simultaneously herewith, and all pleadings, records, and files on record herein, and upon such oral argument as may be made, or other evidence presented, at the hearing on this matter.

Date: August 24, 2015

Respectfully Submitted,
MICHEL & ASSOCIATES, P.C.

Anna M. Barvir
Counsel for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Code of Civil Procedure section 1021.5 recognizes "that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embedded in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (*Woodland Hills Resids. Assn. v. City Council* (1979) 23 Cal.3d 917, 933.)

This lawsuit challenged Defendants' implementation of the recently enacted Firearm Safety Certificate Program ("FSC Program") and long-gun safe-handling demonstrations. Seeking declaratory and injunctive relief and a writ of mandate, Plaintiffs charged that Defendants' failure to comply with the requirements of the Administrative Procedure Act ("APA") in announcing rules for the FSC Program's administration and to adopt the legislatively mandated regulations for the safety demonstrations denied the public their statutory right to notice and an opportunity to be heard. Some time after Plaintiffs brought suit, Defendants voluntarily initiated APA compliance, giving Plaintiffs the relief they sought. Because Plaintiffs' lawsuit coaxed Defendants' compliance, enforcing a public right and conferring a substantial benefit on the general public, Plaintiffs are entitled to compensation under section 1021.5.

As described below and evidenced by the copious records filed in support of this request, all of the time for which Plaintiffs seek recovery is reasonable. And the rates sought appropriately reflect those of comparable attorneys in the Fresno community. What's more, Plaintiffs repeatedly attempted to resolve this case without much of the time and expense accrued, but Defendants' conduct contributed significantly to the hours Plaintiffs ultimately billed.

STATEMENT OF FACTS

October 11, 2013, Governor Edmund "Jerry" Brown signed Senate Bill 683 ("SB 683") into law. The bill created the FSC Program, replacing the now-defunct *Handgun* Safety Certificate Program. It also amended the Penal Code to require that long-gun purchasers successfully perform a "safe-handling demonstration" before taking possession of the firearm. Finally, SB 683 directed Defendant Department of Justice ("the Department") to adopt regulations establishing the "safe-

handling demonstration" before the laws were set to take effect on January 1, 2015, over a year later.

In May 2014, Defendant Stephen Lindley met with interested parties for a meeting to discuss the implementation of the FSC Program and long-gun safe-handling demonstration. (Pedersen Decl., ¶ 3; Worley Decl., ¶¶ 3-4.) During that meeting, Mr. Lindley did not mention anything concerning the drafting or adoption of formal regulations in compliance with the APA. (Worley Decl., ¶ 5.) A follow-up meeting was scheduled for some time in August 2014, but that meeting never took place. (Pedersen Decl., ¶ 5; Worley Decl., ¶ 6.)

On October 2 and December 18, 2014, Defendants announced, by way of letters to various interested parties, several requirements for the implementation and administration of the newly enacted FSC Program and long-gun safe-handling demonstrations. (Ex. I; Ex. K.) Those requirements were not adopted pursuant to the APA.

On October 14, 2014, Plaintiffs' counsel sent Defendants a request for all public records relating to the formal adoption of regulations concerning the FSC Program. (Barvir Decl., ¶ 14; Ex. J; see also Silvoso Decl., ¶ 10.) Plaintiffs' counsel thereafter spoke with Ms. Kimberly Granger, then counsel for the Department of Justice Bureau of Firearms, who sought clarification of the October 12 records request. (Silvoso Decl., ¶ 11.) During that call, Ms. Granger admitted that Defendants were not drafting or adopting APA-compliant regulations for the FSC Program, and when further questioned about any documents relating to such regulations, she responded "you mean the ones we [Department staff] aren't writing?" (Silvoso Decl., ¶ 11.)

In December 2014, Special Agent Supervisor for Defendant Department's Bureau of Firearms, Mr. Blake Graham, held a second meeting with FSC stakeholders. (Pedersen Decl., ¶ 6; Worley Decl., ¶¶ 8-9.) Mr. Graham there admitted the Department had not drafted or adopted APA-compliant regulations due to the absence of the Department staff member responsible for implementing SB 683. (Pedersen Decl., ¶ 7; Worley Decl., ¶ 10.) When one attendee informed Mr. Graham that Defendants were legally obligated to promulgate formal regulations, Mr. Graham explained they were unnecessary because the Department could simply issue bulletins, and that it *could* always adopt emergency regulations after January 2015, *if it had* to. (Worley Decl., ¶ 11.)

Around December 22, 2014, it became apparent to Plaintiffs that Defendants would not—and, in fact, did not have the statutorily mandated time available to—adopt regulations compliant with the APA by the January 1 deadline. (Silvoso Decl., ¶ 13.) Instead, it was clear from their December 18, 2014 letter that it was Defendants' intention to enforce the underground regulations they had announced by way of letter on October 2nd. (Silvoso Decl., ¶ 13; Ex. K.)

On December 29, 2014, Plaintiff *FFLGuard*, Inc., submitted a petition to the Office of Administrative Law ("OAL") and to Defendants Harris and Lindley, complaining of Defendants' failure to adhere to the APA when adopting FSC regulations. (Barvir Decl., ¶ 16; Ex. L; see also Silvoso Decl., ¶ 14.) Defendants did not respond to *FFLGuard*'s petition; they instead began enforcing the rules on January 1. (Barvir Decl., ¶ 17; Silvoso Decl., ¶ 15.)

On December 30, counsel for Plaintiffs e-mailed Ms. Granger informing her of Plaintiffs' intention to file suit on January 5 and to immediately seek and move for a TRO/OSC. Ms. Granger asked for copies of the papers Plaintiffs intended to file. Because the papers were not yet drafted and the regulations were not yet in effect, Plaintiffs' counsel offered to try to provide Plaintiffs' moving papers by January 2. (Silvoso Decl., ¶ 16; Ex. C.)

On January 2, 2015, Plaintiffs' counsel again e-mailed counsel for Defendants, asking whether Defendants intended to appear and oppose Plaintiffs' TRO/OSC. Defendants' counsel responded that he believed Plaintiffs' December 30 e-mail did not comply with ex parte notice requirements. He also stated that he intended to object to the TRO/OSC on both procedural and substantive grounds, though he did not indicate what those substantive grounds might be. (Silvoso Decl, ¶ 19; Ex. D; see also Brady Decl. ¶ 11.) Counsel proceeded to exchange a series of e-mails regarding conformity with procedure and similar matters. But Defendants' counsel did not, during these many exchanges, disclose that Defendants were in the process of promulgating compliant regulations—or that they ever intended to. (Brady Decl., ¶ 11; Ex. D.)

Plaintiffs thus brought suit on January 6, 2015, challenging the four underground regulations adopted and enforced by Defendants. (Verified Compl. for Decl. & Inj. Rel. ("Compl."), ¶¶ 1-11, 78-126.) They also sought a writ of mandate compelling Defendants to adopt regulations for the long-gun safe-handling demonstrations. (Compl., ¶¶ 127-131.) On the same

day, Plaintiffs' counsel e-mailed notice to Defendants of Plaintiffs' TRO/OSC. A lengthy back-and-forth regarding Defendants' service preferences followed. But again, Defendants never disclosed their intention to adopt formal regulations. (Brady Decl, ¶ 12; Ex. D.)

On January 7, 2015, Plaintiffs filed their TRO/OSC application and a hearing was held. Mr. Jeffrey Rich filed an opposition and appeared on behalf of all Defendants. But neither in their papers nor during oral argument did Defendants ever claim they intended to comply with the APA or that Plaintiffs could not succeed. (Barvir Decl., ¶ 22; Brady Decl., ¶ 13; Ex. E; see Defs.' Oppn. Pls.' TRO/OSC.) Indeed, Defendants' "position [was] that there *may* be some problems that need to be worked out, *maybe* the Department of Justice can work these problems out." (Ex. M, p. 4:6-8, italics added; Barvir Decl., ¶ 22; Brady Decl., ¶ 13.)

Because Plaintiffs' counsel believed the Court's handling of their TRO/OSC suggested they would ultimately prevail, Mr. Sean Brady e-mailed Mr. Rich, to suggest a settlement discussion. (Brady Decl., ¶ 14; Ex. E; see also Barvir Decl., ¶ 23.) Defendants' counsel responded, embarking counsel on a volley of e-mails regarding (1) the parties' disagreement over whether Plaintiffs had been authorized to re-file their TRO/OSC application, (2) the authority for Plaintiffs' fee claim, and (3) Plaintiffs' duty to provide evidence of irreparable harm for preliminary relief. But yet again, Defendants never suggested that they had intended to comply with the APA. (Brady Decl., ¶ 15; Ex. E; see also Barvir Decl., ¶ 24.)

Two days later, Defendants notified Plaintiffs *for the first time* that they were "in the process of preparing emergency regulations and final regulations, pursuant to the Administrative Procedures [sic] Act. . . ." (Brady Decl., ¶ 16; Ex. N; see also Barvir Decl., ¶ 25.) Two weeks later, having heard nothing more about the status of such regulations, Plaintiffs' counsel, to gauge whether settlement was possible, contacted Mr. Rich to inquire if and when the Department intended to begin the emergency rule-making process. (Barvir Decl., ¶ 26; Ex. O.) Plaintiffs would learn two days later that Defendants intended to delay submitting the emergency package for at least another month. (Barvir Decl., ¶ 27; Ex. O.) Indeed, the emergency regulation package would not be finalized and submitted to OAL until February 25, 2015—seven weeks and one day after this lawsuit was filed. (Barvir Decl., ¶ 28; Ex. Q.)

On March 4, 2015, Defendants filed a demurrer to Plaintiffs' First Amended Complaint. Defendants argued that no actual controversy had existed between the parties because "(1) the defendants do not actually oppose the position taken by the plaintiffs that Penal Code section 26860, subdivision (b), requires regulations, and (2) the defendants submitted emergency regulations under the APA, ..." (Defs.' Mem. Supp. Demurrer, p. 7.)

Five days later, the OAL adopted Defendants' emergency regulations for the implementation and maintenance of the FSC Program and safe-handling demonstrations. The newly adopted regulatory package formalized each of the four illegally adopted and previously enforced rules challenged in Plaintiffs' first through sixth causes of action for declaratory relief. (Cal. Code Regs. tit. 11, §§ 4250., subd. (a), 4251, subd. (c), 4254, subd. (c), 4256, 4257; Pls.' First Am. Compl., pp. 17-25.) It also formalized regulations for the implementation of the long-gun safe-handling demonstration as requested in Plaintiffs' seventh cause of action for writ of mandate. (Cal. Code Regs. tit. 11, §§ 4256-4257; First Am. Compl., pp. 25-26.)

Plaintiffs filed a non-opposition to Defendants' demurrer because the promulgation of the emergency regulations favorably mooted each of Plaintiffs' claims. They requested, however, that the Court delay entry of judgment so the parties could engage in limited discovery regarding attorneys' fees. Defendants opposed Plaintiffs' request for want of a formally noticed motion. On April 14, 2015, the Court issued a tentative ruling sustaining Defendants' general demurrer and denying Plaintiffs' informal request to delay entry of judgment. That same day, before the Court issued its tentative, Plaintiffs filed a noticed Motion to Delay Entry of Judgment. Briefing and a hearing on Plaintiffs' motion followed. The Court denied Plaintiffs' request on May 22, 2015.

On May 5, 2015, Defendants filed a Proposed Judgment of Dismissal. In response, Plaintiffs filed timely objections. Plaintiffs challenged, inter alia, Defendants' attempt to recover costs absent a memorandum of costs. While the Court never formally ruled on Plaintiffs' objections, its May 22 Order directed Defendants to prepare a new proposed judgment with an award of costs based upon a memorandum of costs pursuant to the California Rules of Court.

The Court issued judgement on June 3, 2015, and Defendants filed a Notice of Entry of Judgment on June 26. Plaintiffs now bring this attorneys' fees motion pursuant to section 1021.5.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO REASONABLE ATTORNEYS' FEES

A party is entitled to fees under the "private attorney general doctrine," as codified at section 1021.5 of the Rules of Civil Procedure, if four conditions are met: (1) the party is the successful or prevailing party; (2) the action enforced an important public interest; (3) the action conferred a significant benefit on the general public or a large class; and (4) the necessity and financial burden of private enforcement make an award "appropriate." (Code Civ. Proc., § 1021.5.) Plaintiffs readily satisfy these requirements.

A. Plaintiffs Are the Successful Party Because Their Lawsuit Substantially Motivated Defendants to Comply With the Administrative Procedure Act

To effectuate the purpose of section 1021.5, courts have taken a "broad, pragmatic view of what constitutes a 'successful party' "; indeed, "a plaintiff need not obtain a judgment in its favor to be a 'successful party.' " *Hogar Dulce Hogar v. Cmty. Devel. Commn. of Escondido* (2007) 157 Cal.App.4th 1358, 1365.) Rather, a plaintiff prevails when it obtains the relief sought, "regardless of whether [it] is obtained through a voluntary change in the defendant's conduct, through a settlement or otherwise." (*Ibid.*)

Under the catalyst theory, the defining characteristic of "successful party" "is the impact of the [party's] action, not the manner of its resolution." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 566.) And so when a litigant has successfully changed the condition it sought to correct through litigation, it is the prevailing party under catalyst if: (1) the lawsuit substantially contributed to the defendant providing the relief sought; (2) the lawsuit was necessary and meritorious; and (3) the plaintiff reasonably attempted to settle the matter short of litigation. (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608; see also *Graham*, *supra*, 34 Cal.4th at pp. 567-577.) Because Defendants adopted APA-compliant regulations, providing the relief Plaintiffs sought, and because Plaintiffs readily meet each of these factors, they are the prevailing party for purposes of section 1021.5 attorneys' fees.

1. Plaintiffs' Lawsuit Was a Substantial Contributing Factor

To succeed on their catalyst-based fee claim, Plaintiffs are not required to have been the

sole cause of Defendants' eventual compliance with the APA in formulating regulations for the FSC Program. Instead, Plaintiffs must show that this litigation was a substantial contributing factor. (*Hogar*, *supra*, 157 Cal.App.4th at p. 1365.) "Put another way, courts check to see whether the lawsuit initiated by the plaintiff was 'demonstrably influential' in overturning, remedying, or prompting a change in the state of affairs challenged by the lawsuit." (*Karuk Tribe of N. Cal. v. Cal. Reg. Water Quality Control Bd.* (2010) 183 Cal.App.4th 330, 363.) In weighing whether a plaintiff's actions were "demonstrably influential," the chronology "raise[s] an inference that the litigation was the catalyst for the relief." (*Hogar*, *supra*, 157 Cal.App.4th at p. 1366.)

Here, the chronology of events is telling. SB 683 was signed into law in October 2013. More than a year later, Defendants had done little more than send letters to interested parties informing them of the new FSC requirements set to take effect on January 1, 2015. (Ex. I; Ex. K.) Although Defendants were required to follow the APA rulemaking procedures in promulgating those rules, they only did so after Plaintiffs brought suit. During the *fourteen months* between SB 683's adoption and the filing of litigation, Plaintiffs made many efforts to encourage Defendants to adopt formal regulations. But Defendants ignored them all.

In October 2014, Plaintiffs' counsel sent Defendants a request for public records regarding the FSC Program, including information regarding formally adopted regulations. In response, Deputy Attorney General Granger admitted to Plaintiffs' counsel that Defendants were not promulgating such regulations for the administration of SB 683. (Silvoso Decl., ¶ 11.)

In December 2014, Mr. Graham, Special Agent Supervisor for the Bureau of Firearms, invited FSC stakeholders to meet with Department representatives regarding the administration of the FSC Program. (Pedersen Decl., ¶ 6; Worley Decl., ¶ 8.) He there admitted that the Department had not and did not intend to draft APA-compliant regulations. (Worley, Decl. ¶ 10.) Instead, he claimed they were unnecessary because the Department could simply issue bulletins and—*if it had to*—complete emergency regulations later. (Worley, Decl. ¶ 11.)

And despite receiving a copy of Plaintiff *FFLGuard*'s OAL petition more than a week before Plaintiffs' brought suit, Defendants never responded stating they agreed with *FFLGuard*'s position or that they would be promulgating formal regulations. (Barvir Decl., ¶¶ 16-17; Silvoso

Decl., ¶¶ 14-15; Ex. L.) Defendants instead remained silent as to these matters—even during more than a week of spirited back-and-forth regarding Plaintiffs' pending lawsuit. (Barvir Decl., ¶¶ 18-21; Brady Decl., ¶¶ 9-12; Silvoso Decl., ¶¶ 16-19; Ex. C; Ex. D.)

Indeed, throughout the course of that pre-litigation communication, Defendants' counsel never once mentioned that litigation could be avoided because Defendants were considering the adoption of compliant regulations. The most telling exchange occurred in response to Plaintiffs' counsel's December 30 ex parte notice. Instead of using that opportunity to avoid litigation by disclosing their intentions, Defendants chose to harp on procedural requirements for filing, notice, and service. (Brady Decl., ¶¶ 9-12; Silvoso Decl., ¶¶ 16-19; Ex. C; Ex. D.)

Defendants' response to Plaintiffs' application for TRO/OSC further supports Plaintiffs' catalyst theory. Defendants never argued—at the hearing or in their opposition papers—that Plaintiffs would not prevail for lack of actual controversy because Defendants agreed that formal regulations were necessary or that Defendants intended to adopt such. Instead, they conceded that "there may be some problems that need to be worked out," and that "*maybe* the Department of Justice can work these problems out." (Ex. M, p. 4:6-8, italics added.) Had Defendants any concrete intention to prepare APA-compliant regulations at that time, surely counsel would have made it known instead of vaguely insisting the Department *might* get around to it, *if* they found any practical problems with the application of the illegal regulations they were already enforcing.

Instead, it was not until two days later—and only after Plaintiffs' counsel suggested settlement—that Defendants first mentioned they were considering emergency regulations. (Barvir Decl., ¶¶ 23-25; Brady Decl., ¶¶ 14-16; Ex. E; Ex. N.) Defendants did not state that such regulations were already being drafted or that they were being drafted prior to litigation. Nor did they provide an estimated date for their completion. In fact, Defendants did not inform Plaintiffs of anything for two weeks, when Plaintiffs requested an estimated time to expect the regulations to be submitted. (Barvir Decl., ¶¶ 26-27; Brady Decl., ¶ 17; Ex. O.) Defendants claimed the regulations were still being circulated and would not be ready until March. (Barvir Decl., ¶ 27; Ex. O.) It was not until February 25 that Defendants finalized and submitted an emergency regulation package to OAL—some seven weeks after litigation began. (Barvir Decl., ¶¶ 28; Ex. P.)

Viewed as a whole, the chronology is clear. Plaintiffs' lawsuit was, at least, a substantial factor motivating Defendants' compliance with the APA. If Defendants had ever truly intended to comply prior to the litigation, certainly they would have mentioned it during their various communications with firearm retailers, certified instructors, firearm-rights groups, or Plaintiffs' counsel. And, more to the point, had Defendants intended to comply, Ms. Granger would not have admitted otherwise. (Silvoso Decl., ¶ 11.) Even assuming Defendants changed course *after* that admission, surely they would have mentioned it in their December 18 letter to firearm retailers. Their failure to do any of these things confirms the lawsuit prompted compliance.

2. Plaintiffs' Lawsuit Was Necessary and Meritorious

Under catalyst theory, the lawsuit must also have achieved its desired result " 'by threat of victory,' not 'by dint of nuisance and threat of expense.' " (*Graham, supra*, 34 Cal.4th at p. 575.) In making that determination, "the court is to inquire not into a defendant's subjective belief about the suit but rather to gauge, objectively speaking, whether the lawsuit had merit." (*Ibid.*) A lawsuit has "merit" if it is not "frivolous, unreasonable or groundless." (*Ibid.*)

Plaintiffs' goal here was simple—to prompt Defendants to comply with the APA in promulgating regulations for implementing the FSC Program and safe-handling demonstrations. As individuals affected by those regulations, Plaintiffs simply wanted to be heard. At no time between October 2013 and January 2015, did Defendants give the public notice and opportunity to provide comment on any proposed regulations. Plaintiffs' pre-litigation attempts to encourage compliance went ignored while Defendants subverted the APA, depriving the public of its rights to openness and accountability. To address this violation, Plaintiffs' only option was to bring suit.

What's more, Defendants' actions indicate they agreed with Plaintiffs. They never disputed the merits of Plaintiffs' primary claims in opposing the TRO/OSC. And their agreement with Plaintiffs on demurrer and ultimate compliance with the APA indicates that those claims had merit. (See Defs. Demurrer, p. 1 ["The obvious significance of the emergency regulations is that there is nothing to litigate in this case. . . With the emergency regulations, there obviously can be no controversy and there is nothing left to be determined by the court."].) Indeed, Plaintiffs' claims were straightforward and the likelihood they would have succeeded had Defendants not

voluntarily complied was clear. (See Pls.' Ex Parte Appln. TRO/OSC, pp. 5-10.)

3. Plaintiffs Attempted to Settle the Matter Short of Litigation

"Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." (*Graham, supra*, 34 Cal.4th at p. 577.) "What constitutes a 'reasonable' time will depend on the context." (*Ibid.*)

Plaintiffs' counsel raised their concerns with Defendants' counsel, Ms. Granger, about a month after Defendants first announced the unlawful regulations and a month-and-a-half before they were set to take effect. Defendants then admitted they were not preparing formal regulations. (Silvoso Decl., ¶ 11.) During a subsequent meeting to which Plaintiff CRPA was a party, Defendants confirmed that admission and indicated they had no present intention to adopt APA regulations before the law took effect. (Pedersen Decl., ¶¶ 6-7; Worley Decl., ¶¶ 10-11.) After Defendants sent their December 18 letter, it became more apparent that Defendants would not relent. (Ex. K.) So Plaintiff *FFLGuard* provided written notification, describing their grievances in great detail and proposing a remedy. (Ex. L.) But Defendants did not respond.

Plaintiffs' counsel again informed Defendants of their grievances on December 30 in an e-mail, stating that if Defendants did not initiate a rulemaking, Plaintiffs would file suit. It was fully within Defendants' power to prevent litigation; they just had to notify Plaintiffs of their intent to comply with the APA. They instead chose to nitpick over procedure, never revealing anything about pending regulations. Further, Plaintiffs waited another week for Defendants to change their position, and only when it was apparent Defendants were not willing, Plaintiffs sued. It is clear from these facts that Plaintiffs reasonably attempted to avoid litigation.

B. Plaintiffs Enforced Important Rights Affecting the Public Interest

To determine the "importance" of the rights vindicated, the court must "realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." (*Woodland Hills Residents Assn., Inc. v. City Council* [*Woodland Hills*] (1979) 23 Cal.3d 917, 936; see *Graham, supra* 34 Cal.4th at p. 577.) It is undeniable that the APA

protects a most-important public right. Indeed, the APA is "designed to provide the public with a meaningful opportunity to participate in the adoption of state regulations and to ensure that regulations are clear, necessary and legally valid." (Office of Administrative Law, Answers to Frequently Asked Questions (2007) <http://www.oal.ca.gov/faq.htm> [as of Aug. 23, 2015].) It was enacted to secure the public benefits of openness, accessibility, and accountability in the formulation of rules that implement legislative enactments. (*Tidewater Marine W., Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569.) In short, the APA safeguards our nation's democratic values and protects against "bureaucratic tyranny." (*Ibid.*) Once a government agency proposes regulations, the public has an overriding interest in the faithful enforcement of APA procedures. Because Plaintiffs' lawsuit substantially contributed to Defendants' compliance, the lawsuit enforced the public's exceptionally important right to government openness and transparency.

C. Plaintiffs Conferred a Significant Benefit on the General Public

Similarly, the lawsuit must also confer a "significant benefit" on the general public or a large class of persons. (*Woodland Hills*, *supra*, 23 Cal.3d at p. 939.) "[T]he 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but . . . may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." (*Ibid.*; see also *Schwartz v. Rosemead* (1984) 155 Cal.App.3d 547, 558 [finding a significant benefit in action to enforce the California Environmental Quality Act "secured the opportunity for a large number of fellow residents and affected property owners to voice their concerns and objections," and "permitted a large class of persons to contribute their input towards the City's ultimate decision."].)

Here, the general public benefitted from the enforcement of the APA and, from that, the achievement of the critical democratic principles of transparency and public involvement. Only after Plaintiffs brought suit did Defendants provide the public an opportunity to voice their concerns regarding the FSC regulations. And the public did not waste that opportunity—indeed, the OAL received some *9,100 pages of public comment* from those affected. (Ex. R.) Those pages provided meaningful input regarding the emergency regulations, including information about any

possible unintended consequences. What's more, countless other members of the public who were notified, but who chose not to comment, were reassured that Defendants were promulgating regulations in accordance with an important public interest law. So Plaintiffs' lawsuit didn't simply elicit the enforcement of statutory policy, it allowed our democracy to thrive another day.

D. The Necessity and Financial Burden of Private Enforcement Make a Fee Award Appropriate

The Court must finally examine " 'whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.' " (*In re Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, 1214.) Again, Plaintiffs readily satisfy these prongs.

1. Private Enforcement Was Necessary to Compel Defendants to Comply

When analyzing whether private enforcement is necessary, courts " 'look[] to the adequacy of public enforcement and seek[] economic equalization of representation in cases where private enforcement is necessary.' " (*Whitley*, *supra*, 50 Cal.4th at p. 1215.) In other words, necessity is established when "public enforcement is not available, or not sufficiently available." (*Id.* at p. 1217.) When proceeding against the only government agency bearing responsibility for public enforcement the need for private enforcement is "clear." (*Woodland Hills*, *supra*, 23 Cal. 3d at p. 941.) The Department is the only state agency responsible adopting regulations to implement the FSC Program—and, more importantly, it was the only agency statutorily mandated to adopt safe-handling regulations pursuant to Penal Code section 26860, subdivision (b). It failed to do either.

Despite multiple opportunities, Defendants made no indication they intended to comply with the APA. Indeed, they suggested just the opposite. (Silvoso Decl., ¶ 11.) They never mentioned it in their letters to FSC stakeholders. (Ex. I; Ex. K.) And they never once raised it in any of the voluminous e-mails exchanged prior to January 6. At that point, it was apparent that continuing to await public enforcement was futile. Private action was unavoidable.

2. The Burden of Private Enforcement Warrants Subsidizing Fees

Fees are recoverable "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of

proportion to his individual stake in the matter.' " (See *Woodland Hills*, *supra*, 23 Cal.3d at p. 941.) In other words, a fee award is proper unless "the expected value of the litigant's own monetary award *exceeds by a substantial margin* the actual litigation costs." (*L.A. Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 10, italics added; see also *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635 ["When the record indicates that the *primary* effect of a lawsuit was to advance or vindicate a plaintiff's personal economic interests, an award of fees under section 1021.5 is improper."], italics added.)

Nothing on the record indicates that Plaintiffs were motivated by a financial interest in the outcome of the case, let alone that they were motivated *primarily* by those interests The record instead establishes only that Plaintiffs have an actual interest in the FSC Program and so had a statutory right to notice and an opportunity to comment. Moreover, Plaintiffs in fact gained nothing financially, for the very regulations Plaintiffs challenged were formally adopted through Defendants' emergency regulatory package.

Plaintiffs sought nothing more than the enforcement of their right to notice and an opportunity to be heard. Plaintiffs challenged Defendants' adoption of underground regulations not to have those regulations struck down, but to ensure that the APA would be followed if regulations were adopted. And this is what happened. To the extent Plaintiffs were motivated by non-pecuniary interests in transparency, open government, and their personal desire to offer public comment, "a litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining fees under Code of Civil Procedure section 1021.5." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211.) A fee award is instead *justified* under section 1021.5 because it is meant to encourage suits by exactly these types of interested parties. Because Plaintiffs had no *pecuniary* interest, the unavoidable financial burden of bringing a lawsuit against a government agency warrants a fee award.

II. THE AMOUNT OF ATTORNEYS' FEES REQUESTED IS REASONABLE

A. California Adheres to a Lodestar Calculation for a Reasonable Fee Award

When a party is entitled to attorneys' fees under section 1021.5, the amount of the award is calculated according to the "lodestar/multiplier" method, whereby the base fee or "lodestar" is

determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) To fix the fee at the fair market value of the specific legal services provided, the lodestar may then be enhanced by a multiplier after the court has considered other factors concerning the lawsuit. (*Press v. Lucky Stores* (1983) 34 Cal.3d 311, 322; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

Plaintiffs here seek a lodestar of $113,619.00 for 528.2 hours of work on the merits, not to be augmented by any multiplier due to the straightforward nature of Plaintiffs' claims. In light of the experience and reputation of Plaintiffs' attorneys and the outcome of this case, these figures will result in a more-than-reasonable fee award.

B. Plaintiffs' Requested Lodestar Represents an Appropriate Valuation of the Time Spent by Plaintiffs' Counsel

1. Counsel's Hours Are Reasonable

The prevailing party is entitled to compensation for "*all* the hours reasonably spent." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.) "The question is not whether . . . in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success" when the work was performed. (*Woolridge v. Marlene Indus. Corp.* (6th Cir. 1990) 898 F.2d 1169, 1177.) Counsel's "sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required." (*Perkins v. Mobile Housing Bd.* (11th Cir. 1988) 847 F.2d 735, 738; see also, *Wershaba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254-55 [attorney declarations evidencing their reasonable rates and the hours spent establish a fee claim].) Once a fully documented claim is presented, the burden shifts to the fee opponent to demonstrate with specific evidence that the hours or rates claimed are not reasonable. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.)

Every hour Plaintiffs claim is compensable, for Plaintiffs' success here was complete. They sought to compel Defendants to formally adopt regulations for the FSC Program and safe-handling demonstrations pursuant to the APA—and they got nothing less.

Second, Plaintiffs' fee claim is documented in detail both by Plaintiffs' counsel's

declaration and by billing records prepared at or around the time all work was performed. (See Barvir Decl., ¶¶ 31-81; Ex. B.) Ms. Barvir provides a step-by-step summary of the various tasks that required counsel's time. (See Barvir Decl.) And "the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case. . . ." (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112.) Further, Plaintiffs' counsel has exercised considerable "billing judgment," excluding from this fee claim time for entries that might be considered vague, excessive, or redundant. (Barvir Decl., ¶ 35; Ex. G [counsel has written off 574.4 hours].) And they seek no recovery for time spent preparing this fee motion.

Additionally, all of Plaintiffs' requested hours were reasonably spent. The declarations of Ms. Barvir and Messrs. Silvoso and Brady, illustrate the time and effort required of Plaintiffs' counsel to bring this case to its successful conclusion. And they identify key reasons Plaintiffs' counsel made the decisions they made through the litigation. (See, e.g, Barvir Decl., ¶¶ 12-29.)

2. Counsels' Schedule of Hourly Rates Is Reasonable

Plaintiffs' attorneys are entitled to compensation at rates that reflect the current "prevailing hourly rate in the community," *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1094, weighing the rates of attorneys of similar skill, reputation, and experience for comparable legal services, *Crommie v. California Public Utilities Commission* (N.D. Cal. 1994) 840 F.Supp. 719, 724-725. As described in the attached Declarations of C.D. Michel, Joseph A. Silvoso, Sean A. Brady, and Anna M. Barvir, the experience and reputation of Plaintiffs' counsel justifies the rates sought. As further attested to in the Declaration of Michael S. Helsley, the rates of the four attorneys performing the work in this case are more than reasonable, being well within the range of rates charged by comparable professionals in the Fresno legal community. (Helsely Decl., ¶¶ 4-10.)

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for reasonable attorneys fees in the amount of $113,619.00 be granted against Defendants.

Date: August 24, 2015

MICHEL & ASSOCIATES, P.C.

Anna M. Barvir
Counsel for Plaintiffs

PROOF OF SERVICE

I, Laura Quesada, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On August 25, 2015, I served the foregoing document(s) described as:

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

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Mr. Jeffrey Rich
Deputy Attorney General
1300 I Street
Sacramento, CA 95814

__ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.

Executed on _____, 2015, at Long Beach, California.

X (OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance.

Executed on August 25, 2015, at Long Beach, California.

X (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 the member of the bar of this court at whose direction the service was made.

LAURA L. QUESADA