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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.; and 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' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO DELAY ENTRY OF JUDGMENT

Date:	May 21, 2015
Time:	3:30 p.m.
Dept:	503
Judge:	Honorable Alan M. Simpson
Trial Date:	None
Action Filed:	January 6, 2015

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I. IT IS PREMATURE TO ARGUE THE MERITS OF PLAINTIFFS' YET-TO-BE-FILED MOTION FOR ATTORNEYS' FEES

Defendants' opposition prematurely attempts to litigate the merits of an attorneys' fee motion that does not yet exist, claiming that because Plaintiffs' anticipated fee motion lacks merit, they should be denied the opportunity to conduct discovery regarding their entitlement to fees. (See Defs.' Oppn., pp. 6-8.) In effect, Defendants ask the Court to deny Plaintiffs the opportunity to engage in limited discovery to weigh the validity of their fee claim on the grounds that they *do not have a valid fee claim*. That argument is circular.

Moreover, Defendants' request would require the Court to make a ruling that would negate its previous order, which expressly states that "Plaintiffs are free to move for an award of attorney's fees within the jurisdictional time limits set forth in the California Rules of Court." (Law & Mot. Min. Order, April 16, 2015.)

In any event, the instant motion involves only the question of whether the Court may grant such relief as is necessary for Plaintiffs to engage in limited discovery. Defendants' argument concerning the merits of Plaintiffs' attorneys' fee application is thus irrelevant to this motion and should be ruled on at the proper time—after Plaintiffs file their application for attorneys' fees. Out of an abundance of caution, however, Plaintiffs address Defendants' fee argument below.

II. REGARDLESS, SECTION 1021.5 DOES NOT PROHIBIT FEE RECOVERY SIMPLY BECAUSE PLAINTIFFS MIGHT HAVE HAD SOME PERSONAL STAKE IN THE OUTCOME OF THE SUIT

A successful party is entitled to attorneys' fees under the "private attorney general doctrine," as codified at section 1021.5 of the California Rules of Civil Procedure, if three conditions are met: "(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (Code Civ. Proc., § 1021.5; see also *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 570 [21 Cal.Rptr.3d 331].)[1] Plaintiffs

[1] If, as here, "plaintiffs' action has produced no monetary recovery, factor '(c)' of section 1021.5 is not applicable." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d

readily satisfy these requirements—a fact that will be established when Plaintiffs file a formally noticed fee motion. Focusing on factor (b) (i.e, the necessity and financial burden of private enforcement), Defendants argue that "[b]ased on the record in this case, it is undisputed that plaintiffs brought this action to advance their respective personal economic interests," and so Plaintiffs' yet-to-be-filed fee motion must fail on its face. (Defs.' Oppn., p. 8.) Defendants are wrong on both counts.

Significantly, the very case Defendants cite for their position is clear that not just any economic interest in litigation will override a Plaintiffs' entitlement to fees. (Defs.' Oppn., p. 7, quoting *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634 [71 Cal.Rptr.2d 632].) Only "[w]hen 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." (*Ibid.*, italics added.) This analysis requires more than the mere suggestion that a plaintiff might have had some financial stake in the case. The monetary benefits obtained must be quantified, then discounted by the likelihood of success and weighed against the actual cost of litigation. (*L.A. Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9 [232 Cal.Rptr. 697].) 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." (*Ibid.*, italics added.) Even if it could be found that Plaintiffs had some economic interest, Defendants' conclusory argument and mere speculation that Plaintiffs initiated this lawsuit for personal financial gain falls far short of establishing that the cost of litigation outweighed any such interest.

And nothing on the record indicates that Plaintiffs were motivated at all by a financial interest in the outcome of this litigation—let alone that they were motivated *primarily* by those interests. The highlighted portions of Plaintiffs' First Amended Complaint and each Plaintiff's declaration reproduced in Defendants' opposition papers, establish only that Plaintiffs have an actual interest in the FSC Program and so had a statutory right to notice and an opportunity to provide comment regarding the regulations at issue in this case. They provide little, if anything, about the Plaintiffs' economic interest in the FSC Program or how the cost of compliance with the

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917, 935 [154 Cal.Rptr. 503].)

challenged regulations might impact them. They certainly say *nothing* about the cost of compliance in comparison to the anticipated cost of litigation, as would be required to establish the pecuniary interest necessary to override a prevailing party's fee claim. (See *L.A. Protective League*, *supra*, 188 Cal.App.3d at pp. 9-10.)

Instead, the record is quite clear that Plaintiffs sought nothing more than notice and an opportunity to submit public comment regarding any regulations governing the FSC Program or safe-handling demonstrations that they themselves would be subject to. For Plaintiffs brought this suit to challenge Defendants' adoption and implementation of illegal underground regulations not simply to have those regulations struck down, but to ensure that the stringent requirements of the Administrative Procedure Act ("APA") would be followed if and when any regulations regarding the FSC Program were adopted.[2] And, in fact, that was the very impact of this litigation. Plaintiffs gained nothing financially. Indeed, the very regulations challenged here were formally adopted as part of Defendants' emergency regulatory package pursuant to the APA.

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 [117 Cal.Rptr.3d 342].) "[S]urely, *abstract or ideological* personal interests were never

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[2] It is clear from Plaintiffs' application for TRO/OSC that they never intended this litigation to permanently bar Defendants from enforcing regulations regarding the FSC Program and safe-handling demonstrations; instead, they sought to enjoin only the enforcement of the illegal underground regulations pending the formal adoption of proper regulations pursuant to the APA. (Pls.' TRO/OSC App., p. 12 ["What's more, Plaintiffs *do not seek to enjoin enforcement of the FSC Program in its entirety*—only Defendants' invalid regulations. Because the FSC Program derives from a self- executing statutory scheme—one that does not require implementing regulations to be enforced—the Program will remain effective and enforceable. . . . Indeed, for years before the FSC Program took effect, Defendants have administered the very-similar HSC Program without the challenged requirements. Administering FSC in the same way should do little, if any, harm to Defendants *until they adopt proper regulations*. In any event, any turmoil Defendants experience in the *meantime* is the product of Defendants' own unlawful conduct."], italics added; p. 13 ["Plaintiffs are therefore irreparably harmed, because they cannot, ***until*** *the Department implements regulations consistent with the processes required by the APA*, engage in lawful and constitutionally protected transactions."], italics added.)

intended by the Legislature to defeat [catalyst-based] fee claims." (*Hammond v. Agran* (2002) 99 Cal.App.4th 115, 126 [99 Cal.App.4th 115], disapproved on another ground in *Whitley*, *supra*, 50 Cal.4th 1206.) A fee award is instead *justified* under section 1021.5 because it is meant to encourage suits by exactly these types of interested parties.

III. PLAINTIFFS' REQUEST IS BASED ON AN ABUNDANCE OF LEGAL AUTHORITY RECOGNIZING THE COURT'S BROAD POWER TO CONTROL ITS CALENDAR AND GRANT SUCH RELIEF AS IS NECESSARY TO SERVE THE INTERESTS OF JUSTICE

Defendants would have the Court believe that Plaintiffs have provided no authority to support their request for limited discovery through a delay of entry of judgment or through whatever means the Court deems appropriate. (Defs.' Oppn., p. 8.) But even the most cursory review of Plaintiffs' moving papers belies Defendants' claim. (Pls.' Mot., pp. 6-8, quoting Code Civ. Proc., § 128, subd. (a)(8), *Cottle v. Super. Ct.* (1992) 3 Cal.App.4th 1367, 1377-1378 [5 Cal.Rptr.2d 882], *James H. v. Super. Ct.* (1978) 77 Cal.App.3d 169, 175 [143 Cal.Rptr. 398], *Adamson v. Super. Ct.* (1980) 113 Cal.App.3d 505, 509 [169 Cal.Rptr. 866], *Mowrer v. Super. Ct.* (1969) 3 Cal.App.3d 223, 230 [83 Cal.Rptr. 125], *Graham*, *supra*, 34 Cal.4th at p. 576, quoting *Folsom v. Butte Cnty. Assn. of Govts.* (1982) 32 Cal.3d 668, 685 [186 Cal.Rptr. 589], Pearl, California Attorney Fee Awards (3rd ed. Cal CEB) § 2.96, and Dean, *Catalyst for Change* (July-Aug., 2005) Los Angeles Lawyer, at p. 33.) In fact, Plaintiffs' request is based on the clearly established grounds that the Court has broad authority to control its proceedings—especially when such action is necessary to serve the interests of justice. (*Id.* at p. 6, quoting Code Civ. Proc., § 128, subd. (a)(8) and *Cottle*, *supra*, 3 Cal.App.4th at p. 1377.) It also finds support in the hardly novel principle that " '[c]ourts have the ***inherent power to create new forms of procedure*** in particular pending cases . . . where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.' " (*Id.* at pp. 6-7, emphasis added, quoting *James H.*, *supra*, 77 Cal.App.3d 169, 175, and citing *Adamson*, *supra*, 113 Cal.App.3d at p. 509, *Mowrer*, *supra*, 3 Cal.App.3d at p. 230, and *Cottle*, *supra*, 3 Cal.App.4th at p. 1378.)

In light of the overwhelming authority on point, it is beyond dispute—and Defendants in fact did *not* dispute—that the Court enjoys great latitude in controlling the proceedings before it, including discovery matters, to ensure that justice is done. Defendants posit no reason that

granting Plaintiffs' reasonable request for some time to conduct limited discovery would exceed that authority. It seems more likely, in fact, that denial of that request will be deemed an abuse of discretion for justice will not be served if Plaintiffs are denied the opportunity to obtain necessary evidence supporting their fee motion and because Defendants have not shown good cause to deny Plaintiffs that right. (See *Oak Grove Sch. Dist. of Santa Clara Cnty. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 712 [32 Cal.Rptr. 288] ["[P]laintiff sought testimony concerning an issue of fact which did not exist at the time of the trial of the eminent domain action, i.e., the question of attorneys' fees. This issue came into being upon the abandonment of the eminent domain action and it would be an unwarranted limitation of the discovery statutes to deny plaintiff the right to inquire into matters relating to this new factual issue unless defendants can show good cause therefor."].)

Defendants' only response to Plaintiffs' extensive authority seems to be that *Graham v. DaimlerChrysler Corp.* does not explicitly authorize the specific relief that Plaintiffs seek. (Defs.' Oppn., p. 8.) But that is hardly surprising. For catalyst-based fee motions are quite rare and even more rare is the need for discovery to gather the evidence necessary to support them. As such, there simply are no published state cases addressing the issue. *Graham* comes closest, and though it did not expand on the nature of the "economical, straightforward inquiry" or the "abbreviated evidentiary hearing" the court considered necessary in catalyst cases, it did not restrict (implicitly or explicitly) a plaintiff's right to conduct discovery relevant to the lawsuit's catalytic effect. To the contrary, *Graham* recognized that the trial court permitted extensive post-dismissal discovery and, even though faced with questions regarding the necessity of factfinding in catalyst cases, it never questioned the trial court's authority to permit such discovery.

Moreover, a party's entitlement to some discovery in connection with a motion for attorneys' fees is far from unprecedented. To the contrary, it finds significant support in state law. (See *Oak Grove Sch. Dist. of Santa Clara Cnty.*, *supra*, 217 Cal.App.2d at p. 712; *Save Open Space Santa Monica Mountains v. Super. Ct.* (2000) 84 Cal.App.4th 235, 250 [100 Cal.Rptr.2d 725]; see also Code Civ. Proc., § 2017.010 [unless otherwise limited by court order, "any party may obtain discovery . . . that is relevant to the . . . determination of *any motion made in that*

action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence"], italics added.) And it comports with several federal catalyst-based cases that implicitly acknowledge the need for discovery to prove causation. (See *Iranian Students Assn. v. Sawyer* (5th Cir. 1981) 639 F.2d 1160, 1163 [court of appeal held it was clear error to deny opportunity for a full evidentiary hearing as to which party was prevailing for purposes of catalyst fees]; *Robinson v. Kimbrough* (5th Cir. 1981) 652 F.2d 458, 467 [plaintiffs seeking to show that defendants' voluntary revision of jury lists was substantially caused by their lawsuit, and defendants denying a connection, "should be allowed to submit additional evidence on this issue"]; *Royal Crown Cola Co. v. Coca-Cola Company* (11th Cir. 1989) 887 F.2d 1480, 1486-1487 [reversed catalyst award because plaintiff did not prove causation and did not engage in discovery that might have uncovered evidence supporting that factor]; *Fields v. City of Tarpon Springs* (11th Cir. 1983) 721 F.2d 318, 320, 321 [court properly applied catalyst theory having "held evidentiary hearings over three days to determine if [defendants' "voluntary" conduct] had resulted from this lawsuit" and considered evidence on the question introduced by the plaintiffs showing that defendants' conduct had occurred subsequent to the lawsuit].)

Plaintiffs ultimately ask nothing more from the Court than it exercise its broad discretion to allow them to engage in limited discovery relevant to their entitlement to attorneys' fees—be it through delaying entry of judgment or through any other means the Court deems appropriate. Their request is based on an abundance of relevant authority unanswered by Defendants. And absent a showing of good cause, Defendants' argument that Plaintiffs should be denied that discovery must be rejected.

IV. THIS COURT'S RULING ON DEFENDANTS' DEMURRER CANNOT BE READ TO BAR THE RELIEF PLAINTIFFS PRESENTLY SEEK

Defendants repeatedly claim that Plaintiffs filed the present motion following the Court's sustaining of Defendants' demurrer and ruling denying Plaintiffs' informal request to delay entry of judgment. (Defs.' Oppn., pp. 1, 9.) In doing so, Defendants imply that Plaintiffs wilfully ignored the Court's April 13 tentative ruling and subsequent order, arguing that the Court specifically authorized Plaintiffs to move for an award of attorney's fees but did not similarly

authorize the instant motion.

But Defendants mischaracterize both the Court's ruling and Plaintiffs' actions. Nothing in the order prohibits Plaintiffs from filing a formally noticed motion requesting any relief necessary to permit discovery in the interests of justice. Surely such an order (based not on a noticed motion or points and authorities) would be an abuse of discretion as the discovery statutes are to be construed liberally *in favor* of discovery and denied only upon a showing of good cause. (*Oak Grove Sch. Dist. of Santa Clara Cnty.*, *supra*, 217 Cal.App.2d at p. 712.)

Further, Plaintiffs prepared this motion in response not to the Court's denial of their informal request for delay of entry of judgment, but to Defendants' complaint that Plaintiffs' request was "not properly before the court" and that a "statutorily noticed motion" was required. (Defs.' Reply Pls.' Non-oppn. to Demurrer, p. 1.) What's more, they submitted their motion to a professional attorney's service for filing at approximately 2:04 p.m. on Tuesday, April 14—nearly an hour before the scheduled release of the Court's tentative ruling on Defendants' unopposed demurrer. When preparing and filing the instant motion, Plaintiffs could not have known—and in fact did not know—that the Court would soon issue a ruling denying their informal request.

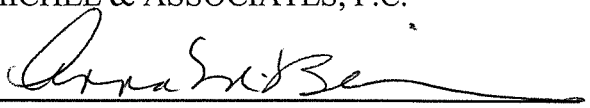
V. CONCLUSION

For the reasons stated in Plaintiffs' Motion and further clarified above, Plaintiffs request that the Court grant them leave to engage in limited discovery for the purpose of investigating and confirming the validity of their attorneys' fees claim. Specifically, they request that the Court exercise its broad discretion to delay entry of judgment pending post-dismissal discovery or order such relief as it deems necessary to allow Plaintiffs to conduct the needed discovery.

Plaintiffs further request that the Court not enter the proposed judgment of dismissal "without delay" as requested by Defendants. (Defs.' Oppn., p. 10.) The Court should instead wait until Plaintiffs' formally filed and noticed objections have been heard and ruled on.

Date: May 14, 2015

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir
Counsel for Plaintiffs

PROOF OF SERVICE

I, Laura L. 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 May 14, 2015, I served the foregoing document(s) described as:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO DELAY ENTRY OF JUDGMENT

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.

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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