

Filed By Fax

1 C. D. Michel - SBN 144258
2 Joseph A. Silvoso, III - SBN 248502
3 Sean A. Brady - SBN 262007
4 Anna M. Barvir - SBN 268728
5 **MICHEL & ASSOCIATES, P.C.**
6 180 East Ocean Blvd., Suite 200
7 Long Beach, CA 90802
8 Telephone: (562) 216-4444
9 Fax: (562) 216-4445
cmichel@michellawyers.com

10 Attorneys for Plaintiffs

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF FRESNO

13 KIM BELEMJIAN; JONATHAN
14 FAIRFIELD; T.J. JOHNSTON;
15 MATTHEW PIMENTEL; STANLEY ROY;
16 FFLGUARD, INC.; and CALIFORNIA
17 RIFLE AND PISTOL ASSOCIATION,

18 Plaintiffs,

19 vs.

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

28 Defendants.

FILED
NOV 25 2015

FRESNO COUNTY SUPERIOR COURT
By _____

CSP - DEPUTY

CASE NO. 15-CE-CG-00029

PLAINTIFFS' REQUEST FOR ORAL
TESTIMONY IN SUPPORT OF MOTION
FOR ATTORNEYS' FEES

Date: December 16, 2015
Time: 3:30 p.m.
Dept: 503
Judge: Hon. Alan M. Simpson

Action Filed: January 6, 2015

REQUEST FOR ORAL TESTIMONY

Pursuant to California Rules of Court, rule 3.1306(a) and (b), Plaintiffs Kim Belemjian, Jonathan Fairfield, T.J. Johnston, Matthew Pimentel, Stanley Roy, *FFLGuard*, Inc., and California Rifle and Pistol Association (“Plaintiffs”) file this request to present oral testimony in support of their Motion for Attorneys’ Fees. More specifically, Plaintiffs wish to present oral testimony establishing that the present lawsuit was a substantial factor motivating Defendants to adopt formal regulations for the Firearm Safety Certificate Program (“FSC Program”) and safe-handling demonstrations. Plaintiffs request the opportunity to take the oral testimony of the following witnesses: Defendants’ Person Most Knowledgeable about Defendants’ initiation of formulating regulations for the FSC Program and safe-handling demonstrations, and Ms. Kimberly Granger, counsel for the Department of Justice, Bureau of Firearms, during the period the FSC regulations were supposed to have been prepared pursuant to statute. The estimated time for testimony is two hours.

14 For good cause, and in the interests of justice and fairness, this Court should exercise its
15 discretion to hear oral testimony so the parties may fairly assess and confirm whether Plaintiffs'
16 lawsuit substantially motivated Defendants to comply with the Administrative Procedure Act
17 ("APA"), affording Plaintiffs the relief they sought through litigation. This request is based on
18 precedent authorizing evidentiary hearings for catalyst-based attorneys' fees motions and on this
19 Court's broad authority to control its proceedings where action is necessary to serve the interests
20 of justice.

I. THE COURT HAS THE INHERENT AUTHORITY TO HEAR ORAL TESTIMONY IN SUPPORT OF CATALYST-BASED FEE CLAIMS

The Court has broad authority to control its proceedings especially where, as here, such action is necessary to serve the interests of justice. Indeed, “[e]very court shall have the power . . . [t]o amend and control its process and orders so as to make them conform to law and justice.” (Code Civ. Proc., § 128, subd. (a)(8).) California “[c]ourts [even] have the inherent power to create new forms of procedure in particular pending cases.” (*James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175.) This “power arises from necessity where, in the absence of any

1 previously established procedural rule, *rights would be lost* or the court would be unable to
2 function.’ ” (*Ibid.*, italics added; see also *Adamson v. Superior Court* (1980) 113 Cal.App.3d 505,
3 509 [“Courts are not powerless to formulate rules of procedure where justice demands it.”].)

4 While it has the authority to, this Court need not tread new ground here. The Court of
5 Appeal has made clear that courts may exercise their discretion to allow plaintiffs seeking
6 catalyst-based fees to engage in limited discovery for the purpose of eliciting the evidence
7 necessary to prove up their fee claim. “When a lawsuit has been mooted by a defendant’s change
8 in conduct, some development of the factual record is *required* in order to prevail on a catalyst
9 theory.” (*Graham v. Daimler Chrysler Corp.* (2004) 34 Cal.4th 553, 576.) Such a record is likely
10 to have been developed through the normal course of litigation. But when “the suit is mooted early
11 in its prosecution . . . , it may generally be established during the attorney fee proceeding by
12 declarations, or, at the discretion of the trial court, by an abbreviated evidentiary hearing.” (*Ibid.*,
13 emphasis added; see also *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288 (hereafter *Sagaser*);
14 Pearl, California Attorney Fee Awards (3rd ed. Cal CEB) § 2.96.)

15 What’s more, the Court has discretion to allow oral testimony at a hearing in instances
16 where documentary evidence (e.g., affidavits and declarations) cannot present the evidence as
17 effectively as oral testimony. (*Rosenthal v. Great W. Fin. Securities Corp.* (1996) 14 Cal.4th 394,
18 414 (hereafter *Rosenthal*) [finding that since “the enforceability of an arbitration clause may
19 depend upon which of two sharply conflicting factual accounts is to be believed, the better course
20 would normally be for the trial court to hear oral testimony and allow the parties the opportunity
21 for cross-examination,” because “it’s pretty difficult to weigh credibility without seeing the
22 witnesses.”]; see also Cal. Rules of Court, rule 3.1306, subds. (a)-(b).)

23 **II. Justice Would Be Served by Allowing Plaintiffs the Opportunity to Develop Evidence
24 on Their Fee Claim that Is Unavailable by Other Means**

25 Holding an evidentiary hearing regarding matters relevant to Plaintiffs’ entitlement to fees
26 would serve the interests of justice. Plaintiffs made many efforts to obtain—and provided
27 countless opportunities for Defendants to disclose—information regarding when and why
28 Defendants began the process to comply with requirements of the APA; information that could

1 have dissuaded Plaintiffs from pursuing catalyst-based attorneys' fees at all. For instance:

- 2 • Defendants could have produced documents demonstrating that they intended to
3 promulgate APA-compliant regulations in response to Plaintiffs' counsel's October 2014
request for public records;
- 4
- 5 • Defendants' representatives could have disclosed during their meetings with FSC Program
stakeholders prior to January 1, 2015, that they intended to promulgate formal regulations;
- 6
- 7 • Defendants' counsel could have, in any one of the multitude of correspondence exchanges
with Plaintiffs' counsel in the week leading up to the initiation of this suit, explained that
litigation would be unnecessary because Defendants were in the process of promulgating
formal regulations;
- 8
- 9 • Defendants could have responded to Plaintiffs' petition to the OAL challenging the FSC
requirements as underground regulations with a simple statement that Defendants are in
the process of preparing emergency regulations. But Plaintiffs did not receive any such
statement and have no reason to believe Defendants even provided one to OAL;
- 10
- 11 • In their written opposition to Plaintiffs' application for a TRO/OSC, Defendants could
have mentioned that they were in the process of promulgating regulations and so Plaintiffs
could not prevail on the merits, but instead argued that Plaintiffs had not established a
likelihood of irreparable harm;
- 12
- 13 • Defendants could have raised the issue at the hearing on Plaintiffs' application for a
TRO/OSC; or
- 14
- 15 • In response to Plaintiffs' requests for discovery in Plaintiffs' Non-Opposition to Demurrer
and their Motion to Delay Entry of Judgment, Defendants could have voluntarily offered
at least some of the documents Plaintiffs sought rather than taking affirmative steps to
keep all of that evidence from coming to light.

17 At any time prior to Plaintiffs bringing their fee motion, Defendants could have simply
18 produced evidence demonstrating that their decision to adopt APA-compliant FSC regulations
19 was made wholly apart from Plaintiffs' actions, but they did not do so. Instead, Defendants have
20 not only remained silent, they have actively opposed Plaintiffs' efforts to learn what happened
21 during the time Defendants should have been preparing formal regulations. As such, only
22 Defendants know just when and why they decided to promulgate the emergency FSC and safe-
23 handling regulations. Plaintiffs should be granted an opportunity to uncover this information
24 through oral testimony in support of their fee motion to determine whether it was their lawsuit that
25 prompted Defendants' APA compliance to moot this lawsuit.

26 Absent that opportunity, justice and fairness will not be served. (See *Oak Grove Sch. Dist.*
27 *of Santa Clara Cnty. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 712 (hereafter *Oak*
28 *Grove*).) Though Plaintiffs contend the chronological record of events leading up to and during

1 litigation provides ample evidence that Plaintiffs' lawsuit was a substantial factor motivating
2 Defendants to promulgate the emergency regulations (Pls.' Mem. Supp. Mot. Attys. Fees, pp. 7-9,
3 an evidentiary hearing would give Plaintiffs the opportunity to establish the precise factual and
4 legal conditions motivating Defendants to act. Without a hearing, Plaintiffs will be denied that
5 best opportunity to test the veracity of Defendants' claims that this lawsuit was not a catalyst for
6 their actions.

7 Finally, it is proper for the Court to allow an evidentiary hearing to elicit the necessary
8 evidence relative to Plaintiffs' catalyst-based attorneys' fee motion. (Dean, *Catalyst for Change*
9 (July-Aug., 2005) Los Angeles Lawyer, at p. 33.) If Plaintiffs' request is denied, the Court will not
10 only discourage the resolution of future disputes before the completion of discovery, but it may
11 deter public interest plaintiffs from bringing lawsuits against government agencies altogether, or at
12 least to compel their compliance with the APA. (*Ibid.*) For the government can often unilaterally
13 moot a plaintiff's claims prior to discovery by voluntarily changing its conduct. And, without the
14 opportunity to present oral testimony regarding their entitlement to fees, plaintiffs may very well
15 be unable to recover the significant fees incurred in bringing an agency's illegal conduct to light
16 and to vindicate the public interest.

17 **III. Denying Plaintiffs an Evidentiary Hearing, Foreclosing the Final Opportunity to
18 Discover Evidence Supporting Their Fee Motion, Is Likely an Abuse of Discretion**

19 Where there is a direct conflict in testimony, prohibiting oral testimony on a contested
20 issue of fact can be an abuse of discretion. "A trial court determines the propriety of attorneys'
21 fees under section 1021.5 after a hearing which focuses on the criteria established by the statute."
22 (*Sagaser, supra*, 176 Cal.App.3d at pp. 313-314, citing *Woodland Hills Residents Assn., Inc. v.*
23 *City Council* (1979) 23 Cal.3d 917, 933.) One of those criterion is whether the litigation at issue
24 has "resulted in the enforcement of an important right affecting the public interest." (Code Civ.
25 Proc., § 1021.5; see also *Sagaser, supra*, 176 Cal.App.3d at p. 315.) "If the persistence of
26 [Plaintiffs] affected the [Defendants'] decision to [take the action that mooted the lawsuit],
27 then . . . [they] are entitled to attorneys' fees under Code of Civil Procedure section 1021.5
28 attributable to those efforts." (*Sagaser, supra*, 176 Cal.App.3d at p. 315.)

1 Accordingly, because “a factual issue exists as to whether [Plaintiffs’] efforts” (*Sagaser*,
2 *supra*, 176 Cal.App.3d at p. 315) resulted in such here, this Court must make that determination.
3 And because this Court cannot make that determination on the record before it, at least not in
4 favor of Defendants since they have refused to provide any evidence that it was preparing APA-
5 compliant regulations prior to suit, it would be an abuse of discretion to disallow the presentation
6 of oral testimony at the hearing on Plaintiffs’ fee motion. Even if Defendants submit declarations
7 stating that they were doing so, such is not a sufficient substitute to oral testimony subject to cross
8 examination because it depends on the credibility of the witnesses. (See *ante*, Part III, p. 3, citing
9 *Rosenthal*, *supra*, 14 Cal.4th at p. 414.)

10 In *Sagaser v. McCarthy*, for example, plaintiffs brought a California Environmental
11 Quality Act (“CEQA”) challenge to the construction of a prison, which the Court of Appeal
12 dismissed as moot following the passage of a bill that exempted the proposed prison from CEQA
13 compliance and resolved the suit. (176 Cal.App.3d at pp. 315-316.) The legislation also prohibited
14 the prison from using local groundwater. (*Id.* at p. 315.) Because the use of local groundwater was
15 at issue in one of the dismissed causes of action, the court remanded the matter to trial court for an
16 evidentiary hearing to determine whether the plaintiffs’ persistent legal efforts had “affected the
17 Legislature’s decision” and whether plaintiffs’ were entitled to catalyst fees. (*Ibid.*)

18 The case before this Court is on all fours with *Sagaser*. Both cases involve claims against
19 government agencies that violated a state statute in place to promote transparency and
20 accountability when a government agency takes action. Both cases involve defendants who
21 succeeded in having the claims against them dismissed as moot because of actions voluntarily
22 taken by or on behalf of the defendants during the course of litigation. In *Sagaser*, a factual
23 question existed as to whether the plaintiffs’ efforts enticed the Legislature to act, mooting the
24 lawsuit. (*Id.* at p. 315.) Here, while there is plenty of compelling circumstantial evidence
25 supporting Plaintiffs’ catalyst theory, Defendants alone hold the facts regarding whether Plaintiffs’
26 lawsuit caused them to promulgate emergency regulations in compliance with the APA. Yet
27 Defendants have thus far refused to disclose those facts despite Plaintiffs’ repeated requests.
28 Based on these striking similarities, it would likely be an abuse of discretion for this Court to hold

1 an evidentiary hearing.

2 Additionally, in *Oak Grove*, the appellate court held that the trial court abused its
3 discretion in quashing the plaintiff's noticed depositions made after judgment. (*Oak Grove, supra*,
4 217 Cal.App.2d at p. 712.) There, the plaintiff had abandoned an action in eminent domain,
5 entitling defendants to attorney fees and costs. (*Id.* at p. 689.) After judgment, but before the
6 hearing on plaintiff's motion to tax costs, the plaintiff noticed depositions, which were quashed by
7 the lower court. (*Id.* at pp. 711-712.) The plaintiff noticed the depositions because it "sought
8 testimony concerning an issue of fact which did not exist at the time of the trial of the eminent
9 domain action, i.e., the question of attorneys' fees." (*Id.* at p. 712.) The appellate court recognized
10 that even though the discovery statutes give a court wide discretion to quash depositions, "it
11 would be an unwarranted limitation of the discovery statutes to deny plaintiff the right to inquire
12 into matters relating to this new factual issue unless defendants can show good cause therefor."
13 (*Id.* at p. 712.) Because defendants provided no viable grounds for prohibiting the depositions, the
14 trial court's order to quash was an abuse of discretion. (*Id.* at pp. 712-713.)

15 Just as it was an abuse of discretion for the trial court in *Oak Grove* to quash depositions
16 seeking information relative to a new factual issue, to the extent this Court does not intend to
17 grant Plaintiffs' fee motion based on the record already before it, it would likewise be beyond this
18 Court's discretion to deny Plaintiffs the opportunity to present oral testimony on whether
19 Plaintiffs' lawsuit influenced Defendants' promulgation of APA-compliant regulations. For the
20 answer to that new factual question, which arose only after Defendants mooted Plaintiffs' claims,
21 is determinative as to whether Plaintiffs are entitled to catalyst-based attorneys' fees. (*Oak Grove*,
22 *supra*, 217 Cal.App.2d at p. 712.)

23 Plaintiffs anticipate that Defendants will claim their intention to promulgate APA-
24 compliant regulations materialized before Plaintiffs filed suit, barring Plaintiffs' recovery of
25 attorneys' fees. To date, however, Defendants have refused to provide evidence supporting such a
26 claim, and Plaintiffs have been denied any opportunity to compel its production, despite their
27 requesting it twice. (Pls.' Non-Opp. to Defs.' Demurrer at pp. 2, 5; Pls.' Mot. Delay Entry J. at pp.
28 2, 8.) Indeed, in their non-opposition to Defendants' demurrer, Plaintiffs made an informal request

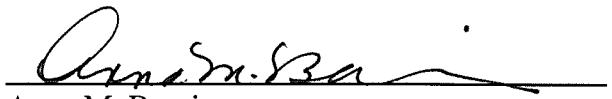
1 for the Court to delay entering judgment to allow the parties to engage in limited discovery. (Pls.’
2 Non-Opp. to Defs.’ Demurrer at pp. 2, 5.) Because Plaintiffs’ request was made informally, the
3 Court denied Plaintiffs the relief they sought. (Law & Mot. Min. Order, Apr. 15, 2015.) When
4 Plaintiffs filed a formal motion seeking to delay entry of judgment and/or for leave to conduct
5 discovery, it was also denied. (Pls.’ Mot. Delay Entry J. at pp. 2, 8; Law & Mot. Min. Order May
6 22, 2015.) Had the Court granted either of Plaintiffs’ requests, through depositions or other
7 limited discovery, Plaintiffs could have uncovered evidence either influencing the strength of their
8 fee motion or deterring them from seeking fees in the first place. Closing the only door left at this
9 stage for Plaintiffs to learn the truth behind Defendants’ actions by denying Plaintiffs’ request for
10 oral testimony would likely constitute an abuse of discretion, to the extent the Court intends to
11 deny Plaintiffs’ fee motion.

12 **IV. CONCLUSION**

13 Although Plaintiffs believe they are entitled to fees based on the compelling chronology of
14 events leading up to and during this lawsuit, should the Court have any doubt that they are,
15 Plaintiffs respectfully ask the Court to grant Plaintiffs permission to present oral testimony at the
16 hearing on their attorneys’ fees motion, currently noticed for December 16, 2015, so that Plaintiffs
17 may investigate and confirm the validity of their catalyst-based fee claim.

18 Date: November 25, 2015

MICHEL & ASSOCIATES, P.C.


Anna M. Barvir
Counsel for Plaintiffs

22

23

24

25

26

27

28

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 November 24, 2015, I served the foregoing document(s) described as:

**PLAINTIFFS' REQUEST FOR ORAL TESTIMONY IN SUPPORT OF
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:

9 Mr. Jeffrey Rich
10 Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814

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

13 Executed on November 24, 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 November 24, 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.

20 _____ (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