

(17)

Tentative Ruling

Re: ***Parker v. State of California***
Court Case No. 10 CECG 02116

Hearing Date: September 14, 2017 (Dept. 402)

Motion: Plaintiffs' Motion for Attorney's Fees [CCP § 1021.5]

Tentative Ruling:

To deny.

Explanation:

Plaintiffs seek fees under Code of Civil Procedure section 1021.5. Section 1021.5 codifies the private attorney general doctrine, which provides an exception to the "American rule" that each party bears its own attorney fees. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147.) The fundamental objective of the private attorney general doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*).) Under section 1021.5, the court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest (3) if a significant benefit has been conferred on the general public or a large class of persons, and (4) the necessity and financial burden of private enforcement are such as to make the award appropriate. (*Ibid.*) The burden is on the claimant for the award of attorney's fees to establish each prerequisite to an award of attorney's fees under Code of Civil Procedure section 1021.5. (*Ebbetts Pass Forest Watch v. Department of Forestry and Fire Protection* (2010) 187 Cal. App. 4th 376, 381.)

1. Successful Party

Courts take "a broad, pragmatic view of what constitutes a 'successful party' " for purposes of a section 1021.5 fee award (*Graham, supra*, 34 Cal.4th at p. 565) and the court must critically analyze the surrounding circumstances of the litigation and pragmatically assess the gains achieved by the action." (*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection, supra*, 187 Cal.App.4th at p. 382.)

Here, plaintiffs obtained summary adjudication of their first cause of action. On January 21, 2011, the Court signed an order of permanent injunction. The permanent injunction forbade the enjoined parties – the State of California, Attorney General Harris, the California Department of Justice, and each of their agents, employees, representative, successors in office, and all persons or entities acting in concert or participation with them – from taking any action to implement, enforce, or give effect to the versions of California Penal Code sections 12060, 12061, and 12318 in effect as of the date of the injunction. On February 22, 2011, the Court signed the Judgment and

judgment was entered in favor of plaintiffs and against defendants based on the Court's written summary adjudication order.

The judgment was timely appealed. On November 6, 2013 the Fifth Appellate District issued its published opinion affirming the judgment in full. On February 9, 2014, the California Supreme Court granted review, which had the effect of depublishing the Court of Appeal opinion under the then in effect Rule of Court 8.1105(e)(1). The Supreme Court dismissed review as moot on December 14, 2016 due to the passage of new legislation. Because of California Rule of Court 8.258(b)(3), the original Court of Appeal decision remains unpublished.

Even though plaintiffs' victory ultimately became moot and did not result in establishing judicial precedent, it would be difficult to say plaintiffs were not the prevailing party.

2. Important Public Right/ Significant Benefit Conferred

In *Woodland Hills Residents Association, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, the California Supreme Court stated that constitutional rights are "important" for purposes of section 1021.5. (*Id.* at p. 935.) "The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7)." (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567.) Litigation which enforces constitutional rights necessarily affects the public interest and confers a significant benefit upon the general public. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318.)

3. Necessity of Private Enforcement

Because the action proceeded against the governmental agencies that were responsible for creating and enforcing the facially vague statutes, it is evident that private, rather than public, enforcement was necessary. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215 (*Whitley*); *Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 941.)

4. Financial Burden of Private Enforcement

The "financial burden of private enforcement" element concerns the costs of litigation and any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. (*Whitley, supra*, 50 Cal.4th at p. 1215.) As a general proposition, an award of attorney fees is appropriate when the cost of the claimant's legal victory transcends his or her personal interest and places a burden on the claimant out of proportion to his or her individual stake in the matter. (*Ibid.*)

In evaluating the element of financial burden, "the inquiry before the trial court [is] whether there were 'insufficient financial incentives to justify the litigation in economic terms.' " (*Summit Media LLC v. City of Los Angeles* (2015) 240 Cal.App.4th 171, 193 (*Summit Media*); *Millview County Water District v. State Water Resources*

Control Board (2016) 4 Cal.App.5th 759, 768.) If the plaintiff had a “personal financial stake” in the litigation “sufficient to warrant [the] decision to incur significant attorney fees and costs in the vigorous prosecution” of the lawsuit, an award under section 1021.5 is inappropriate. (*Summit Media, supra*, 240 Cal.App.4th at pp. 193–194.) “ ‘Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest.’ ” (*Davis v. Farmers Insurance Exchange* (2016) 245 Cal.App.4th 1302, 1329 (*Davis*) [award inappropriate where plaintiff expected “a substantial financial recovery” from the litigation].) “ ‘Instead, its purpose is to provide some incentive for the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate.’ ” (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635.) “The relevant issue is ‘ “ ‘the estimated value of the case at the time the vital litigation decisions were being made.’ ” ’ ” (*Davis, supra*, 245 Cal.App.4th at p. 1330.)

Each plaintiff or each plaintiffs’ relevant officer or principal has offered a declaration on the subject of their financial interest in this litigation. They are substantially similar in form. Each is addressed in turn.

A. *Clay Parker*

Clay Parker is the former sheriff of Tehama County, California. Parker indisputably has no financial interest in the sale of ammunition. He believed there to be a 10% chance of success of succeeding on the constitutional vagueness challenges based on input received from my attorneys “at the time the vital litigation decisions were being made.” “At the time the vital litigation decisions were being made, [Parker] anticipated this litigation would result in hundreds of thousands of dollars in legal costs. [He] understands the total costs of this litigation exceeded \$700,000.”

At no time does Parker state that he paid, or was at any time responsible for, any of the costs or attorney’s fees incurred in this case. Nor has he established that he had any input in or control over the lawsuit. As such, this case is on point with *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382 (*Torres*), in which a city resident filed petition for writ of mandate, seeking to invalidate waste hauling contract which was signed by mayor pro tempore rather than by mayor, who had refused to sign the contract. When the resident petitioned for section 1021.5 attorney’s fees, the trial court denied the request finding that because the fees had been paid by an organization of the contractor’s competitors who “took over” the lawsuit and “paid for all of it,” awarding fees to the plaintiff who bore no financial burden in bringing the case would not advance section 1021.5 purpose.

The *Torres* court rejected a bright line rule that fees must be awarded if the plaintiff has no financial interest in the litigation. (*Torres, supra*, 234 Cal.App.4th at p. 407.)

As *Whitley* explains, the Legislature’s focus was not whether the litigant expected some benefit or no benefit; the Legislature was concerned with

ensuring that the problem of affordability would not dissuade private citizens from bringing litigation that could benefit the public. Thus, not surprisingly, the Legislature specifically required a finding of “financial burden” for attorney fees to be awarded. (Code Civ. Proc., § 1021.5 [a court may award attorney fees if, inter alia, “the necessity and *financial burden* of private enforcement ... are such as to make the award appropriate...” (italics added)].) In contrast, the litigant’s “offsetting financial benefits” are a consideration courts have appended to the financial burden analysis. (*Whitley, supra*, 50 Cal.4th at p 1215, 117 Cal.Rptr.3d 342, 241 P.3d 840.) The Legislature’s emphasis on financial burden over financial interest suggests a rule opposite to the one advanced by Torres—that is, if the litigant bears no financial burden, Code of Civil Procedure section 1021.5 attorney fees are inappropriate, regardless of the existence or nonexistence of a financial interest.

(*Torres, supra*, 234 Cal.App.4th pp. at 406–07.)

Here, with no evidence that Parker paid any costs or fees, his lack of financial interest is immaterial and he cannot establish his burden was out of proportion to his individual stake in the matter.

B. *Steven Stonecipher*

Steven Stonecipher has, and continues to transfer and receive ammunition that can be used interchangeably between handguns and rifles via mail within California. He also gives away reloaded ammunition. He has no financial interest in this litigation. He believed there to be a 10% chance of success of succeeding on the constitutional vagueness challenges based on input received from his attorneys “at the time the vital litigation decisions were being made.” “At the time the vital litigation decisions were being made,” he anticipated this litigation would result in hundreds of thousands of dollars in legal costs. In fact, its cost exceeds \$700,000.

Like Parker, Stonecipher has presented no evidence that he has paid or is liable for any of the costs or fees incurred in this lawsuit or has had any input into its management. Pursuant to *Torres, supra*, 234 Cal.App.4th pp. at 406–07, he has not demonstrated his burden was out of proportion to his individual stake in the matter.

C. *Able’s Sporting, Inc.*

Randy Wright, President of Able’s Sporting, Inc., (“Able’s”) a Texas corporation that sells and ships directly a variety of ammunition that can be used interchangeably between handguns and rifles to California residents provides the declaration on behalf of Able’s. Able’s generated approximately \$85,680 in net profits from ammunition sales to California between February 1, 2011, and December 31, 2016. He estimates that Able’s will generate approximately \$12,240 in net profits between January 1, 2017, and December 31, 2017. Able’s will no longer sell and ship ammunition directly to unlicensed California residents on or after January 1, 2018, due new legislation that prohibits the company from doing so. Consequently, the estimated total financial

benefit that Able's has and will experience because of its victory in this action is approximately \$97,920.

Wright declares that “[a]ny pecuniary interest reaped by Able's is substantially outweighed by the costs of bringing this litigation” and “[t]he necessity of pursuing this lawsuit placed a burden on Able's that was out of proportion to any financial stake in this case.” However, like the other plaintiffs, Wright does not indicate that Able's has paid, or is liable for any costs or fees incurred in bringing this lawsuit, or that Able's had any right to direct this suit. As such, Able's has no financial burden in the matter and cannot demonstrate its burden was out of proportion to its individual stake in the matter.

D. RTB Sporting Collectibles, LLC

RTG Sporting Collectibles, LLC, is a Texas limited liability company that sells and ships directly to California residents a variety of ammunition that can be used interchangeably between handguns and rifles, but which are primarily sold as collectibles. Its owner, Ray T. Giles, estimates the company generated approximately \$17,760 in profits, before taxes, from ammunition sales to California between February 1, 2011, and December 31, 2016 and that it will generate approximately \$2,960 in profits, before taxes, between January 1, 2017, and December 31, 2017. Like Able's, RTB will no longer be able to sell to residents of California after January 1, 2018.

Giles declares that “[a]ny pecuniary interest reaped by Able's is substantially outweighed by the costs of bringing this litigation” and “[t]he necessity of pursuing this lawsuit placed a burden on Able's that was out of proportion to any financial stake in this case.” Once again, Giles does not indicate that RTG has paid, or is liable for any costs or fees incurred in bringing this lawsuit or that RTG had any right to direct this suit. As such, RTG has no financial burden in the matter and cannot demonstrate its burden was out of proportion to its individual stake in the matter.

E. Herb Bauer Sporting Goods, Inc.

Barry Bauer, president of Herb Bauer Sporting Goods, Inc. (“Herb Bauer”), submits a declaration on behalf of this California corporation which sells a variety of ammunition suitable for use in both handguns and rifles. Herb Bauer would likely have experienced an increase in profits from ammunition sales in the amount of \$4,000 had this litigation not been successful, thereby outweighing any estimated savings in record keeping costs had the litigation failed. Bauer projected a 10% increase in ammunition sales for Herb Bauer as a result of purchasers no longer having access to Herb Bauer's competitors who sell ammunition via mail order. Accordingly, Herb Bauer has no financial interest in the litigation.

Nevertheless, once again, Bauer does not indicate that Herb Bauer has paid, or is liable for any costs or fees incurred in bringing this lawsuit or that Herb Bauer had any right to direct this suit. As such, Herb Bauer has no financial burden in the matter and cannot demonstrate its burden was out of proportion to its individual stake in the matter.

F. CRPA Foundation

The CRPA Foundation, a nonprofit entity, provides a declaration by its Trustee, Steven H. Dember, who attests the CRPA Foundation's charter and bylaws establish that the CRPA Foundation was created to further the interests of its donors and the approximately 30,000 members of California Rifle & Pistol Association, Incorporated ("CRPA"), by promoting the interests of firearms enthusiasts, Second Amendment civil rights activists, and sportsmen through use of donations for, among other things, litigation efforts. Dember states that the CRPA Foundation is not devoted to, nor does it represent, the financial interests of ammunition shippers or retailers.

CRPA Foundation has no membership fees because it is not a membership organization. It is funded entirely by donations. The CRPA Foundation is not dependent on the financial contributions of anyone engaged in the retail sale of ammunition. Businesses engaged in the retail sale of ammunition do not impact the existence of The CRPA Foundation, or its business or litigation decisions as only \$1,280 in contributions from retail businesses of any kind between were made to the CRPA Foundation from 2000 to the present. This accounts for just 0.075% of all donations to the foundation during that period. None of the CRPA Foundation's total contributions during that time came from businesses engaged in the business of selling and shipping ammunition to customers through the mail.

While the Foundation has no financial interest in the sale of ammunition, clearly some of its donors do. "The CRPA Foundation does not share with its donors or the members of CRPA any financial stake in pursuing this lawsuit." (Dember Decl. ¶ 14.) However, a nonprofit corporation must be viewed as having financial stake to same extent as its members, rather than simply as conduit for its members' interests. (*California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1473 (*Matosantos*).) The CRPA Foundation "had a financial stake in this matter to the same extent as its members. As a membership association, it may be inferred '[CRPA Foundation's] very existence depends upon the economic vitality of its members and any benefit or burden derived by [CRPA Foundation] from this lawsuit ultimately redounds to the membership.' " (*Matosantos, supra*, 212 Cal.App.4th at p. 1480, citing *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570.)

Ammunition retailers are not the only class of persons and entities with a financial interest in challenging the subject legislation. Ammunition manufacturers are interested parties, as voiding the legislation would result in more retail activity and ensure a greater market for their product. Gun manufacturers would be even more interested in this litigation – without easy and open access to ammunition gun sales will decline, as a gun is markedly less useful without plentiful ammunition. Thus, the relevant inquiry is not what percent of the Foundation's donors are specifically ammunition retailers, but what number of the donors stand to profit from the litigation. (See *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 247–250 [information about contributors to nonprofit organization's litigation fund was relevant to § 1021.5 attorney fees request and, thus, discoverable because evidence suggested case was litigated by and for their private benefit rather than in the public interest].)

As this information is not disclosed, the court cannot calculate the financial interest of the Foundation.

Finally, there is no statement in Dember's declaration that the Foundation was responsible for the costs and attorney's fees in this case. As a result of all the forgoing, the Foundation cannot demonstrate its burden was out of proportion to its member's stake in the matter.

Accordingly, the motion for attorney's fees is denied.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on** 09/13/17
 (Judge's initials) (Date)