

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER, et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

Case No. F064510

Fresno County Superior Court, Case No. 10-CECG-02116
The Honorable Jeffrey Y. Hamilton, Judge

RESPONDENTS' BRIEF

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
GEORGE WATERS
Deputy Attorney General
State Bar No. 88295
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6059
Fax: (916) 324-8835
E-mail: George.Waters@doj.ca.gov
*Attorneys for Defendants-Respondents State
of California, Kamala Harris, and
California Department of Justice*

Received by Fifth District Court of Appeal

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

Case Name: *SHERIFF CLAY PARKER, et al. v. v. THE STATE OF CALIFORNIA; et al.* Court of Appeal No.: F064510

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

(Check One)

INITIAL CERTIFICATE

☒

SUPPLEMENTAL CERTIFICATE

☐

Please check the applicable box:

☒

There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

☐

Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party <i>Check One</i>	Non-Party	Nature of Interest <i>(Explain)</i>
	<input type="checkbox"/>	<input type="checkbox"/>	
	<input type="checkbox"/>	<input type="checkbox"/>	

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Attorney Submitting Form

GEORGE WATERS
Deputy Attorney General
State Bar No. 88295
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6059
Fax: (916) 324-8835
E-mail: George.Waters@doj.ca.gov

Party Represented

Attorneys for Defendants and Appellants Firearms
Bureau

S/ George Waters
(Signature of Attorney Submitting Form)

11/27/17
(Date)

TABLE OF CONTENTS

	Page
INTRODUCTION	7
STATEMENT OF THE CASE	7
I. Merits Litigation.....	7
II. Fees Litigation.....	9
STANDARD OF REVIEW.....	11
ARGUMENT	12
I. The Trial Court Correctly Concluded that Plaintiffs Did Not Establish an Entitlement to Fees Under California’s Private Attorney General Statute.	12
A. A Party Seeking Fees Bears the Burden of Establishing Each Element of Its Claim.	12
B. The Trial Court Did Not Abuse Its Discretion in Concluding that Plaintiffs Failed to Meet Their Burden of Showing that the Cost of Private Enforcement Outweighed Their Personal Stake in the Outcome.	13
1. Able’s Sporting, Inc.	14
2. RTG Sports Collectibles, LLC.....	15
3. Herb Bauer Sporting Goods, Inc.....	16
4. California Rifle and Pistol Association Foundation	17
5. Sheriff Clay Parker and Stephen Stonecipher.....	17
6. Plaintiffs Did Not Meet Their Burden of Producing Evidence.	18
C. The Trial Court Did Not Abuse Its Discretion by Denying Plaintiffs’ Belated Effort to Supplement the Record.	19
II. Should This Court Conclude that the Trial Court’s Order Was in Error, This Action Should Be Remanded to the Trial Court for Further Proceedings.....	21
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
 CASES	
<i>Beach Colony II v. California Coastal Comm’n</i> (1985) 166 Cal.App.3d 106	14, 18, 19
<i>Bozzi v. Nordstrom, Inc.</i> (2010) 186 Cal.App.4th 755	19, 21
<i>California Licensed Foresters Assn. v. State Bd. of Forestry</i> (1994) 30 Cal.App.4th 562	14, 17
<i>California Redevelopment Association v. Matosantos</i> (2013) 212 Cal.App.4th 1457	12
<i>Children and Families Commission of Fresno County v. Brown</i> (2014) 228 Cal.App.4th 45	12
<i>Conservatorship of Whitley</i> (2010) 50 Cal.4th 1206	13, 14
<i>Consumer Cause Inc. v. Mrs. Gooch’s Natural Foods</i> (2005) 127 Cal.App.4th 387	14
<i>Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection</i> (2010) 187 Cal.App.4th 376	13
<i>Farber v. Bay View Terrace Homeowners Ass’n</i> (2006) 141 Cal.App.4th 1007	20
<i>Farmers Insurance Exchange v. Superior Court</i> (2013) 218 Cal.App.4th 96	9
<i>Graham v. DaimlerChrysler Corp.</i> (2004) 34 Cal.4th 553	22
<i>In re Marriage of Arceneaux</i> (1990) 51 Cal.3d 1130	11

TABLE OF AUTHORITIES (continued)

	Page
<i>Kalivas v. Barry Controls Corp.</i> (1996) 49 Cal.App.4th 1152	20
<i>Parker v. State</i> (2013) previously published at 221 Cal.App.4th 340, review granted and opinion superseded (Cal. 2014) 167 Cal.Rptr.3d 658	8
<i>Parker v. State</i> (Cal. 2014) 167 Cal.Rptr.3d 658	8
<i>Parker v. State</i> (Cal. 2016) 211 Cal.Rptr.3d 98	8
<i>Parker v. State of California</i> , Cal. Sup. Ct. Case No. S215265	9
<i>Planned Parenthood v. City of Santa Maria</i> (1993) 16 Cal.App.4th 685	18
<i>Samaniego v. Empire Today, LLC</i> (2012) 205 Cal.App.4th 1138	19
<i>Satrap v. Pacific Gas & Elec. Co.</i> (1996) 42 Cal.App.4th 72	13
<i>Security Pacific Nat. Bank v. Bradley</i> (1992) 4 Cal.App.4th 89	20
<i>Sky River LLC v. Kern County</i> (2013) 214 Cal.App.4th 720	11
<i>Woodland Hills Residents Assn., Inc. v. City Council</i> (1979) 23 Cal.3d 917	12
 STATUTES	
Civil Code § 1354, subd. (c)	20
Code of Civil Procedure § 1021.5	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	Page
Penal Code	
§ 12060.....	7
§ 12061.....	7
§ 12318.....	7
Safety for All Act of 2016.....	8
 COURT RULES	
California Rules of Court	
Rule 3.1300(d)	19
Rule 8.1115	8

INTRODUCTION

This is an appeal from the trial court's order denying Plaintiffs' fee motion under Code of Civil Procedure section 1021.5. In the underlying merits litigation, the trial court concluded that new legislation regulating "handgun ammunition" was unconstitutionally vague and enjoined its enforcement. After extended attorneys' fees proceedings, the trial court concluded that Plaintiffs had not met their burden of establishing that the cost of litigation outweighed Plaintiffs' financial interest in the litigation, and denied the fee motion.

A trial-court decision on the financial-burden element of a fees claim under section 1021.5 will not be disturbed on appeal absent a prejudicial abuse of discretion. Here, in finding a complete failure of proof on this essential element of Plaintiffs' fee claim, the trial court was acting well within its sound discretion. The trial court also acted within its discretion by denying Plaintiffs' motion to supplement their evidentiary showing in support of the fees motion—made as a last-ditch effort the day of the hearing and only after the court had issued a tentative ruling.

The trial court's order denying the motion for attorneys' fees should be affirmed.

STATEMENT OF THE CASE

I. MERITS LITIGATION

In June 2010, former Tehama County Sheriff Clay Parker, Herb Bauer Sporting Goods, Inc., the California Rifle and Pistol Association Foundation ("CRPA Foundation"), Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Stephen Stonecipher (collectively "Plaintiffs") filed a complaint for declaratory and injunctive relief alleging that former Penal Code sections 12060, 12061 and 12318 were void for vagueness under the Due Process Clause of the Fourteenth Amendment. (RA [Respondents']

Appendix] 19-21, 37-38.) Named as defendants were the State, then Attorney General Jerry Brown, and the California Department of Justice (collectively “the State”). (RA 21-22.) The gist of the complaint was that the then statutory definition of “handgun ammunition”—“ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person”—was unconstitutionally vague. (RA 17.)

There was no trial; the case was resolved on a motion for summary judgment/summary adjudication. At a hearing on January 18, 2011, the superior court denied Plaintiffs’ motion for summary judgment, but granted their motion for summary adjudication on the claim that the challenged statutes were unconstitutionally vague. (RA 51.) The remaining claims were dismissed. (*Id.*) A permanent injunction was entered on January 21, 2011. (RA 108.) Judgment was entered on February 22, 2011. (RA 50.)

On November 6, 2013, a divided panel of the Fifth District Court of Appeal issued an opinion affirming the judgment. (*Parker v. State* (2013) *previously published at* 221 Cal.App.4th 340, *review granted and opinion superseded* (Cal. 2014) 167 Cal.Rptr.3d 658.) On February 19, 2014, the Supreme Court granted the State’s petition for review, which automatically depublished the Court of Appeal’s opinion. (*Parker v. State* (Cal. 2014) 167 Cal.Rptr.3d 658; Cal. Rules of Court, 8.1115, Comment to subd. (e)(1) [before amendments effective July 1, 2016, a grant of review “automatically depublished the decision under review”].) On December 14, 2016, after both a statutory amendment and a ballot measure had made the definition of “handgun ammunition” inoperable, the Supreme Court dismissed review as moot. (*Parker v. State* (Cal. 2016) 211 Cal.Rptr.3d 98 [citing Sen. Bill 1235 (2015-2016 Reg. Sess.) § 4; Safety for All Act of 2016 (Prop. 63, as approved by voters, Gen. Elec. (Nov. 8, 2016).) Plaintiffs’ request to republish the Court of Appeal opinion was denied by the Supreme Court on April 19, 2017. (Docket (Register of Actions),

Parker v. State of California, No. S215265.) As a result, the Court of Appeal opinion remains unpublished and uncitable. (*Farmers Insurance Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 109 [“Without precedential value, a depublished opinion is no longer part of the law and thus ceases to exist”].)

II. FEES LITIGATION¹

On May 16, 2011, Plaintiffs filed a claim for trial-court fees under Code of Civil Procedure section 1021.5. (1 AA [Appellants’ Appendix] 21.) Plaintiffs claimed to have spent 1,760.6 hours on trial court work, and sought a total of \$625,048.75, which included a multiplier of 1.5. (1 AA 39.) The motion originally was calendared for July 7, 2011. (1 AA 21.)

As it turned out, it took more than eight months to resolve the attorneys’ fees claim.

The State’s opposition made two main points: (1) Plaintiffs had no entitlement to fees because they had not met their burden of showing that their litigation costs outweighed their personal stake in the outcome, and (2) Plaintiffs’ claim (\$625,000 for a case resolved on summary judgment) was bloated and unsubstantiated. (1 AA 142-163 [7/13/2011].)

On September 20, 2011, after several continuances, the superior court released a tentative ruling. The tentative concluded that Plaintiffs had not met their burden of showing that their financial burden in pursuing the case was out of proportion to their financial interest:

the Court is unable to determine if the Plaintiffs’ financial burden of attorneys’ fees is out of proportion to their personal stake in litigating the case because the Plaintiffs have failed to provide the Court with evidence establishing what the private

¹ The present appeal is from the trial court’s order on Plaintiffs’ motion for trial court fees. After the Supreme Court dismissed review of the merits appeal as moot, Plaintiffs filed a separate fees motion for appellate fees. (RA 174.) That motion is pending. (RA 178.)

financial or pecuniary interest each Plaintiff had, or did not have, in the litigation at the time that “the vital litigation decisions were made which eventually produced the successful outcome.”

(2 AA at 248-249, citing *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215 (“*Whitley*”).) Thus the tentative ruling was to deny fees.

The hearing was scheduled for the next day, September 21, 2011. Immediately before the hearing, Plaintiffs filed an offer of proof attaching six additional declarations. (2 AA 252-293.) At the hearing, the State’s counsel objected to the new declarations, which neither the court nor State’s counsel had seen. (RT 304-308.) The fee motion was taken under advisement. (2 AA 297.)

While the fee motion was under advisement, Plaintiffs moved to file a supplemental brief in support of fees. (2 AA 299-341.) The State renewed its objection to the six late-filed declarations lodged by Plaintiff on September 21, 2011. (2 AA 342-355.) On November 9, 2011, the superior court set a new hearing date on the fee motion (January 18, 2012) and ordered Plaintiffs to serve and file their billing records. (2 AA 359.) The court also ordered Plaintiffs to respond to the State’s renewed objections to the six late-filed declarations. (2 AA 364.)

This triggered several additional filings by Plaintiffs. On November 15, 2011, Plaintiffs lodged their billing records with the Court, moved to file the records under seal, and moved for a protective order as to the billing records. (RA 111-127; 2 AA 369-393.) On November 16, 2011, Plaintiffs also moved for leave to file additional evidence. (2 AA 394-522.)

At an ex parte hearing on November 30, 2011, several of the pending motions were resolved. The billing records were lodged with the Court, and Plaintiffs’ motion to seal their billing records and Plaintiffs’ motion for protective order were taken off calendar. (RT [Reporter’s Transcript] 416-424.)

On January 18, 2012, the superior court entered an order denying Plaintiffs' request to file additional evidence because Plaintiffs had shown no reasonable explanation for the late filing. The court also adopted its September 20, 2011, tentative ruling denying fees:

After considering the Defendants' written Renewed Objections to New Evidence Lodged on September 21, 2011 and the Plaintiffs' Court Ordered Response to the State's Renewed Objections to New Evidence Lodg[ed] on September 21, 2011, the Court remains persuaded by the Defendants' arguments. While the Plaintiffs contend that they met their initial burden on the attorneys' fee motion in the submission of evidence based on their understanding of controlling law, the Court disagrees. Plaintiffs did not meet their burden for the reasons expressed in the tentative ruling. Thus, the success of the attorneys' fees motion would be dependent on the submission of additional evidence. On this point, the Court agrees with Defendants that the additional materials submitted to the Court were untimely, and that no reasonable explanation was presented for not providing them in the original filing save for Plaintiffs' counsel's judgment call. The Court has discretion to disallow the submission of late-filed evidence. (Cal. Rules of Court, rule 3.1300(d); *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) The Court hereby exercises that discretion in disallowing the filing of Plaintiffs' untimely evidence.

Consequently, the Court adopts its tentative ruling signed and posted on September 20, 2011 and denies the Plaintiffs' motion for attorneys' fees pursuant to Code of Civil Procedure § 1021.5.

(2 AA 674-675.)

STANDARD OF REVIEW

A lower-court order is presumed to be correct on appeal, and "all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The burden of demonstrating error is on appellant. (*Sky River LLC v. Kern County* (2013) 214 Cal.App.4th 720, 740.)

“The decision whether to award attorney fees lies within the discretion of the trial court and will not be disturbed on appeal absent a prejudicial abuse of discretion resulting in a manifest miscarriage of justice.” (*California Redevelopment Association v. Matosantos* (2013) 212 Cal.App.4th 1457, 1474 [internal citations and quote marks omitted]). However, discretion must be exercised in accordance with the law; thus de novo review is appropriate when a trial-court decision “presents an issue of statutory construction or a question of law.” (*Children and Families Commission of Fresno County v. Brown* (2014) 228 Cal.App.4th 45, 57.

The principal issue presented by this appeal—whether the cost of litigation placed a burden on Plaintiffs out of proportion to their financial stake in the matter—is not a question of law and is governed by the abuse-of-discretion standard. (*Children and Families Commission of Fresno County v. Brown*, *supra*, 228 Cal.App.4th at p. 57.)

The financial burden element of section 1021.5 requires a determination of the cost of the litigation relative to its value to [plaintiffs]. This is not a question of law. The trial court, being more familiar with the dynamics of the litigation, is in a better position to assess the financial burden of the lawsuit[.]

(*Id.* at p. 58.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFFS DID NOT ESTABLISH AN ENTITLEMENT TO FEES UNDER CALIFORNIA’S PRIVATE ATTORNEY GENERAL STATUTE.

A. A Party Seeking Fees Bears the Burden of Establishing Each Element of Its Claim.

Code of Civil Procedure section 1021.5 codifies the “private attorney general” doctrine by which attorneys’ fees may be awarded to certain successful litigants. (*Woodland Hills Residents Assn., Inc. v. City Council*

(1979) 23 Cal.3d 917, 933.) There are three elements to a claim for fees under section 1021.5. Eligibility is established when:

1. The action resulted in the enforcement of an important right affecting the public interest;
2. A significant benefit, whether pecuniary or nonpecuniary, was conferred on the general public or a large class of persons; and
3. The necessity and financial burden of private enforcement make an award appropriate.

(*Whitley, supra*, 50 Cal.4th at p. 1214.)

The burden is on the moving party to establish each of these elements. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2010) 187 Cal.App.4th 376, 381.) If any one of the required elements is absent, that alone will suffice to deny a fee request. (*Satrap v. Pacific Gas & Elec. Co.* (1996) 42 Cal.App.4th 72, 81.)

The trial court concluded that Plaintiffs had demonstrated the first two elements (important right and significant benefit) but had failed to establish the third (financial burden out of proportion to Plaintiffs' financial stake). (2 AA 248-249.) The record fully supports the trial court's decision.

B. The Trial Court Did Not Abuse Its Discretion in Concluding that Plaintiffs Failed to Meet Their Burden of Showing that the Cost of Private Enforcement Outweighed Their Personal Stake in the Outcome.

An award of attorneys' fees is appropriate under Code of Civil Procedure section 1021.5 only when the moving party has shown that the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter. (*Whitley, supra*, 50 Cal.4th at p. 1214.)

The trial court must first fix—or at least estimate—the monetary value of the benefits obtained by the successful litigants themselves. . . . Once the court is able to put some kind of number on the gains actually attained it must discount these total

benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome

* * * * *

The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage the litigation of the sort involved in this case.

(*Whitley, supra*, 50 Cal.4th at pp. 1215-16 [internal citations and quote marks omitted].)

Section 1021.5 is intended as a “bounty” for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public. (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570 “*CLFA*”). The burden is on the moving party to establish that the financial burden of private enforcement warrants subsidizing the successful party’s attorneys’ fees. (*Consumer Cause Inc. v. Mrs. Gooch’s Natural Foods* (2005) 127 Cal.App.4th 387, 401; *Beach Colony II v. California Coastal Comm’n* (1985) 166 Cal.App.3d 106, 114-115 (“*Beach Colony II*”).)

In the present case, the trial court concluded that Plaintiffs had not demonstrated that the cost of their legal victory transcended their personal financial interest because they had “failed to provide the Court with evidence establishing what the private financial or pecuniary interest each Plaintiff had, or did not have, in the litigation at the time that ‘the vital litigation decisions were made which eventually produced the successful outcome.’” (2 AA 678-679 (quoting *Whitley, supra*, 50 Cal.4th at pp. 1215-16.)) This conclusion is supported by the record.

1. Able’s Sporting, Inc.

The Verified Complaint alleges that Able’s Sporting, Inc. (“Able’s Inc.”) is an ammunition distributor that ships dozens of different calibers of

firearm ammunition directly to California residents. (RA 20, ¶ 14.) The Complaint further alleges that if Able’s Inc. were forced to cease shipments of ammunition to customers in California, it would experience “a significant decrease in sales and lost profits.” (RA 31, ¶ 77.) In a 2010 declaration in support of preliminary injunction, the President of Able’s Inc. testified that if the challenged statutes went into effect, he would cease shipment of all ammunition suitable for use in both handguns and long guns to California customers. (RA 42, ¶ 9.) He added that “to avoid overstocking and prepare for [the challenged statutes] to take effect, I will reduce the amount of all ammunition . . . that Able’s Sporting, Inc. keeps in stock. . . . *This will cause a significant decrease in profits and result in higher costs for Able’s Sporting, Inc.* because the loss of California customers means [it] will buy less bulk from manufacturers.” (RA 42, ¶ 10 [italics added].)

In their attorneys’ fees papers, Plaintiffs asserted that Able’s Inc. had no significant financial stake in the litigation, but offered no evidence to support that assertion. (1 AA 38.) Based on this record, the trial court correctly concluded that Plaintiffs had failed to present any evidence to support the allegation that the burden of attorneys’ fees was greater than Able’s Inc.’s financial interest in this action. (2 AA 679.)

2. RTG Sports Collectibles, LLC

The Verified Complaint alleges that RTG Sporting Collectibles, LLC, (“RTG LLC”) is an ammunition distributor that ships dozens of different calibers of firearm ammunition directly to California residents. (RA 21, ¶ 15.) The Complaint further alleges that if RTG LLC were forced to cease shipments of ammunition to customers in California, it would experience “a significant decrease in sales and lost profits.” (RA 31, ¶ 77.) In a 2010 declaration in support of preliminary injunction, RTG LLC’s owner testified that if the challenged statutes went into effect, he would cease

shipment of all ammunition suitable for use in both handguns and long guns to California customers. (RA 46, ¶ 8.) He added that RTG LLC “*will lose significant profits* because it relies on the California market for much of the sales.” (*Id.*, italics added.) In a reply declaration submitted in support of Plaintiffs’ fee motion, the owner stated that he does not track ammunition sales by state; that he estimated that RTG LLC made about \$2,190 in profit from sales to California in 2010; and that for various reasons he could not determine the full value of any profit loss. (2 AA 244, ¶¶ 3-5.)

Based on this record, the trial court correctly concluded that RTG LLC had failed to provide an estimate of the financial benefits of this litigation, and thus had failed to establish that the burden of attorneys’ fees was greater than its financial interest in this action. (2 AA 679.)

3. Herb Bauer Sporting Goods, Inc.

The Verified Complaint alleges that Herb Bauer Sporting Goods, Inc. (“Herb Bauer Inc.”) is a brick-and-mortar store that sells ammunition directly to the public. (RA 19, ¶ 12.)

In 2010, the owner of Herb Bauer Inc. submitted a declaration in support of Plaintiffs’ summary-judgment motion testifying to the cost and burden of compliance with the recordkeeping requirements of the challenged statutes. (RA 48, ¶¶ 6-7 [“Ammunition sales usually account for a significant portion of the profit made by Herb Bauer’s Sporting Goods., Inc. . . . It is *costly and burdensome for Herb Bauer’s Sporting Goods, Inc. to intake and store records* for transfers of ammunition as required by [the challenged statutes]”] [emphasis added].)

In their attorneys’ fees papers, Plaintiffs asserted that Herb Bauer Inc. had no significant financial stake in the litigation, but offered no evidence to support that assertion. (1 AA 38.) Based on this record, the trial court correctly concluded that Plaintiffs had failed to present any evidence to

support the assertion that the burden of attorneys' fees was greater than Herb Bauer Inc.'s financial interest in this action. (2 AA 679.)

4. California Rifle and Pistol Association Foundation

The Verified Complaint alleges that the California Rifle and Pistol Association Foundation ("CRPA") "represents the interests of the tens of thousands of its supporters who reside in the State of California and who are too numerous to conveniently bring this action individually, and whose interests include their desire to purchase and transfer ammunition." (RA 20, ¶ 13.) The Complaint further alleges that CRPA's interest in this action was, in part, to represent and protect the financial interests of its members who are in the business of shipping ammunition. (RA 31, ¶ 77 ["*[l]icensed business enterprises, including . . . those represented by CRPA FOUNDATION*" will be harmed by the challenged statutes] [emphasis added].)

In their attorneys' fees papers, Plaintiffs asserted that CRPA had no significant financial stake in the litigation, but offered no evidence to support that assertion. (1 AA 38.) Based on this record, the trial court correctly concluded that Plaintiffs had failed to present sufficient evidence to support the assertion that the burden of attorneys' fees was greater than the financial interest of CRPA and its members in the action. (2 AA 679; see *CLFA, supra*, 30 Cal.App.4th at p. 570.)

5. Sheriff Clay Parker and Stephen Stonecipher

The Verified Complaint alleges that Clay Parker is the Sheriff of Tehama County, and that Steven Stonecipher is a resident of Fresno County who mails ammunition to friends and family and sometimes receives ammunition in the mail from out-of-state shippers. (RA 19-21, ¶¶ 11, 16.)

Plaintiffs' attorneys' fees papers alleged that these Plaintiffs had no financial stake in this action, but failed to present any evidence to that

effect. (1 AA 38, 1 AA 228-232.) Based on this record, the trial court correctly concluded that these Plaintiffs had failed to present any evidence to support the assertion that the burden of attorneys' fees was greater than their financial interest in this action.² (2 AA 679.)

6. Plaintiffs Did Not Meet Their Burden of Producing Evidence.

The burden rests squarely on Plaintiffs, as attorneys' fee claimants, to present evidence establishing that the financial burden of pursuing the litigation was out of proportion to their personal stake in litigating the case. (*Beach Colony II, supra*, 166 Cal.App.3d at p. 113; *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691-692 (“*Planned Parenthood*”).) Plaintiffs' showing on that issue in the trial court was contradictory and equivocal. At the beginning of this action, up through the summary-judgment phase, Plaintiffs asserted a significant financial interest in this case. During the attorneys' fees phase, Plaintiffs first failed to address their financial interest, then attempted to minimize it in speculative and equivocal declarations.

The record reflects that Plaintiffs had two interests in this action. One was to protect the financial interests of four of the six Plaintiffs who had interests in shipping ammunition. Another was to protect the nonpecuniary interests of two individual plaintiffs. These interests were not coterminous. Plaintiffs wholly failed to produce evidence that the cost of litigation transcended their financial interest at the time vital litigation decisions were made. In this circumstance, the trial court was well within its discretion in denying fees. (See *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691-2 [upholding denial of fees where plaintiff had

² In any event, the State does not contend that the individual Plaintiffs had a financial stake in the action. (1 AA 149, ll. 25-27.)

dual motives but failed to produce evidence that the litigation imposed a financial burden disproportionate to its stake]; *Beach Colony II, supra*, 166 Cal.App.3d at p. 113.)

C. The Trial Court Did Not Abuse Its Discretion by Denying Plaintiffs' Belated Effort to Supplement the Record.

“A trial court has broad discretion under rule 3.1300(d) of the Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission.” (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755,765; accord, *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1146.) Here, the trial court denied Plaintiffs' request to supplement the record with late-filed evidence. The Court made an express finding that there was no good cause for the late submission of additional evidence on the day of the hearing:

the additional materials submitted to the Court were untimely, and [] no reasonable explanation was presented for not providing them in the original filing save for Plaintiffs' counsel's judgment call.

(2 AA 674.) Again, the Court's finding finds ample support in the record.

In their offer of proof filed on the day of the fees hearing, Plaintiffs argued that they were unaware that they had the burden of presenting evidence concerning the extent of their pecuniary interest in this action. (2 AA 254.) The record belies that contention. The State's opposition brief, filed more than two months before the hearing, argued that Plaintiffs had not met their burden to show that the costs of private enforcement outweighed their personal stake in the action. (1 AA 149-152.) Plaintiffs' reply, filed a month before the hearing, attached two declarations addressing that issue. (2 AA 228-231; 2 AA 239-244.) It was not until the day of the hearing, *after* the Plaintiffs had seen the tentative ruling, that Plaintiffs tried to file six additional declarations. Plaintiffs were well aware

of their obligation to present additional evidence concerning the extent of their financial interest and had ample time to do so. As the trial court noted, their election to proceed with insufficient evidence was a “judgment call” by counsel, not a mistake or act of excusable neglect requiring the court to accept untimely evidence.

The cases that Plaintiffs rely on in their opening brief are factually distinguishable. For example, in *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, the court of appeal reversed summary judgment entered in favor of the plaintiff bank because the pro per plaintiff’s failure to file a separate statement in opposition to the bank’s second summary-judgment motion was not willful. (*Id.* at p. 98.) The court of appeal noted the defendant (while represented by counsel) had previously filed a separate statement in opposition to the bank’s first summary-judgment motion, and the defendant (while pro per) apparently believed that the separate statement also applied to the second motion. (*Id.* at pp. 92, 98.) Similarly, *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, reversed an order granting summary judgment after the opposing party failed to file a separate statement because she had been misled by an unauthorized local courtroom rule. (*Id.* at p. 1162.)

And in *Farber v. Bay View Terrace Homeowners Ass’n* (2006) 141 Cal.App.4th 1007, the court of appeal affirmed a fee order at a second hearing after the trial court had denied an earlier fee motion without prejudice. (*Id.* at p. 1014.) The court of appeal noted that the denial of a motion without prejudice “impliedly invites the moving party to renew the motion at a later date.” (*Id.* at p. 1015.) Fees were claimed under a statute that granted a successful party an absolute entitlement to fees; the only issue was the amount of fees to be awarded. (See *id.* at p. 1014 [Civil Code § 1354, subd. (c)] then provided “In an action to enforce the governing

documents, the prevailing party shall be awarded reasonable attorney's fees and costs.”)

Significantly, the trial court here did not disallow the late submission without careful thought. As the record shows, the trial court took the matter under submission, received supplemental briefs and filings from counsel, and held a subsequent hearing. (2 AA 364, 673-675; RT 502-510.) But this only underscores the added burden and expense that the initial judgment call of Plaintiffs’ counsel to proceed with a minimal evidentiary showing placed on the court and defendants. No court is required to grant a litigant a second or third bite at the apple in these circumstances. The trial court did not abuse its discretion when it denied Plaintiffs’ request to supplement the record with late-filed evidence. (See *Bozzi v. Nordstrom, Inc.*, *supra*, 186 Cal.App.4th at p. 765.)

II. SHOULD THIS COURT CONCLUDE THAT THE TRIAL COURT’S ORDER WAS IN ERROR, THIS ACTION SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS.

Plaintiffs spend a significant portion of their brief urging the court to enter judgment in their favor for the full amount of their fee claim expanded by the 1.5 multiplier they sought in the trial court. This court should reject this invitation to conduct a fact-intensive, de novo review of the attorneys’ fees claim, one that is not even supported by a full record of the hours and work performed by the attorneys.³

Having concluded that Plaintiffs had no entitlement to fees, the trial court did not reach the issue whether Plaintiffs’ late-filed evidence was sufficient to meet their burden on the financial burden element of section

³ Plaintiffs fail to include their billing records in the record on appeal, limiting their record to the summary declarations found insufficient by the trial court, even though they lodged the records below after being instructed to do so by the court. (RT 416.)

1021.5, and did not reach the issue whether Plaintiffs' claim for \$625,048.75 was reasonable. Should this Court conclude that the trial court erred, this action should be remanded for further proceedings. "[T]he awarding of attorney fees and the calculation of attorney fee enhancements are highly fact specific matters left to the discretion of the trial court." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 581.)

CONCLUSION

For the reasons set forth above, the superior court's order denying fees should be affirmed.

Dated: November 27, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

S/George Waters

GEORGE WATERS
Deputy Attorney General
*Attorneys for Defendants-Respondents
State of California, Xavier Becerra, and
California Department of Justice*

SA2017105238

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' BRIEF uses a 13 point Times New Roman font and contains 4,668 words.

Dated: November 27, 2017 XAVIER BECERRA
Attorney General of California

S/George Waters

GEORGE WATERS
Deputy Attorney General
*Attorneys for Defendants-Respondents
State of California, Kamala Harris, and
California Department of Justice*

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **Sheriff Clay Parker, et al. v. State of California, et al.**
Fifth District Court of Appeal Case No.: F064510
Fresno County Superior Court Case No.: 10-CECG-02116

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On November 27, 2017, I electronically served the attached **RESPONDENTS' BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 27, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Carl Dawson Michel
Michel & Associates, PC
180 E Ocean Blvd., Ste 200
Long Beach, CA 90802
Attorneys for Plaintiffs/Appellants
(1) Courtesy Copy for Counsel's Client

Anna M. Barvir
Michel & Associates, PC
180 E Ocean Blvd., Ste 200
Long Beach, CA 90802
Attorneys for Plaintiffs/Appellants
(1) Courtesy Copy for Counsel's Client

Clerk of Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102
Via Electronic Submission
(Pursuant to Rule 8.212(c)(2))

The Honorable Jeffrey Y. Hamilton
Fresno County Superior Court
B.F. Sisk Courthouse
1130 O Street, Department 402
Fresno, CA 93724

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 27, 2017, at Sacramento, California.

C. McCartney
Declarant

s/C. McCartney
Signature