

FILED

NOV 29 2017

Order After Hearing

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

FRESNO SUPERIOR COURT
By _____
DEPT. 402 - DEPUTY

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

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

Ruling:

The motion is granted in part and denied in part. CRPA Foundation shall recover the sum of money it contributed to the attorney's fees for this case. The CRPA Foundation shall serve and file documentation evidencing this total amount by December 5, 2017. Defendant may file and serve a response to such evidence by December 20, 2017. Plaintiffs may file and serve a reply by December 28, 2017. The court sets a further hearing on this matter for Wednesday, January 10, 2018 at 3:30 p.m. in Department 402.

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.)

Plaintiffs obtained a judgment which was ultimately affirmed on appeal. They are 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 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 does he state that he ever looked to institute this case before finding funding. Parker has not established that he actually 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 a waste hauling contract which was signed by the mayor pro tempore rather than by the 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's purpose.

Nevertheless, 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.)

Plaintiffs argue *Torres* was wrongly decided and/or contrary to the bulk of authority. It is not. *Torres* is firmly based on 2010 California Supreme Court precedent: *Whitley, supra*, 50 Cal.4th 1206. The *Whitley* court considered whether a party's "nonfinancial, nonpecuniary personal interests in the litigation" could be considered in determining whether " 'the necessity and financial burden of private enforcement' " made a party ineligible for attorney fees under section 1021.5. (*Id.* at p. 1211.) The court concluded "a litigant's personal nonpecuniary motives" are irrelevant to the necessity and financial burden elements, thereby restricting analysis under those provisions to "financial incentives and burdens." (*Id.* at pp. 1211.) In reaching its conclusion, *Whitley* noted that in determining financial burden "courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield." (*Id.* at p. 1215.)

Here, there is not only a lack of evidence that Parker paid any costs or fees, in this litigation, but there is affirmative evidence that he paid no costs or fees incurred in bringing this litigation. Exhibit 6 to the Declaration of George Waters is what purports to be a "Memorandum from the Desk of C.D. Michel" dated February 22, 2011, on the letterhead of the law firm of Michel & Associates, P.C. No objections have been made to this document. C.D. Michel, according to his declaration offered in support of this motion, is a partner in the firm of Michel & Associates, and was "was primarily responsible for supervising the work of all professionals working on this matter and for directing the course of the appeal." (Michel Decl. at ¶ 12.)

The first page of the Memorandum states that this lawsuit was "funded exclusively by the NRA and CRPA Foundation." (Emphasis in original.) Later, the Memorandum clarifies that the funding for the case was provided by the Legal Action Project, "a joint effort between the NRA and CRPA Foundation." However, "[p]rincipal funding for the case was provided by the NRA." According to the Memorandum, the NRA has been litigating cases in California courts for decades to promote the right of self-defense and the Second Amendment. The NRA and CRPA Foundation formed the NRA/CRPA Foundation Legal Action Project (LAP), "a joint venture to proactively strike down ill-conceived gun control laws and ordinances and advance the rights of firearm owners, specifically in California." The Memorandum observes that "sometimes success is more likely when LAP's litigation efforts are kept low profile, so the details of every lawsuit are not always released." The memorandum indicates that donations to support this case and others like it can be made at www.nraila.com the website for the NRA Institute for Legislative Action, and concludes by thanking its readers for their support "in making the NRA and CRPAF strong."

These facts are closely akin to those in *Torres, supra*. There is no evidence Parker directed the course of the lawsuit or had any input into any strategic decision. He had no financial stake in the suit, but no financial investment in the suit either. Rather, the lion's share of the suit's funding came from the NRA, a non-party, who for various reasons wanted to keep its involvement "low profile." In weighing the financial burdens and incentives involved in bringing a lawsuit in which section 1021.5 attorney's fees are claimed, the court may consider evidence that the named plaintiff is litigating the

action primarily for the benefit of nonlitigants with a financial interest in the outcome. (*Torres, supra*, 234 Cal.App.4th at p. 405, citing *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 254.)

In *Torres*, the trial court found that the Torres, the petitioner, was told to go to a nonparty association of the respondent's business competitor's to have his legal fees paid. Once he did so, "[t]hey 'took over' " and "[t]hey paid for all of it." Thus, from Torres's perspective, there was no cost-benefit analysis. In the trial court's words, "Torres is not a petitioner who wished to pursue a lawsuit, found an attorney, and then also found a collateral source of funding for his attorneys' fees." On the contrary, the *Torres* trial court found, the lawsuit would not have been filed without the nonparty's agreement to pay Torres' attorneys' fees. "Under these circumstances, the trial court determined awarding fees to Torres—who bore no financial burden in bringing the case—would not advance Code of Civil Procedure section 1021.5's purposes." (*Torres, supra*, 234 Cal.App.4th at p. 406.) Here, there is no evidence that Parker wished to file a lawsuit before seeking out either the NRA or the CRPA Foundation for funding of the lawsuit. If anything, there is a suggestion in the Memorandum that the NRA/CRPA Foundation Legal Action Project would have brought the litigation with any qualified individual plaintiffs; the identity of the individual plaintiffs was not material to the lawsuit. (Memorandum at § V(A).)

This court is well aware of the authority holding that section 1021.5 fees may be awarded to pro bono attorneys and a private attorney general plaintiff need not be personally liable for attorney's fees for a law firm to collect section 1021.5 fees. They are inapposite in this case.

In *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311 (*Press*), the defendants challenged only the issue of whether the lawsuit conferred a "significant benefit" on the general public or a large class or persons. Nevertheless, as part of reviewing the propriety of the fee award, the high court looked at the "necessity and financial burden" prong as well. The entire analysis of that prong is as follows: "Plaintiffs' action also fulfills section 1021.5's mandate that 'the necessity and financial burden of private enforcement [be] such as to make the award appropriate.' This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit. Since plaintiffs had no pecuniary interest in the outcome of the litigation, 'the financial burden in this case [was] such that an attorney fee award [was] appropriate in order to assure the effectuation of an important public policy.' (*Woodland Hills, supra*, 23 Cal.3d at p. 942.)" (*Id.* at p. 321.) *Press* is good law so far as it is applicable. However, Parker is one of several plaintiffs and not all of the plaintiffs are equally situated.

Plaintiffs also rely on federal cases.¹ *Rodriguez v. Taylor* (3rd Cir. 1977) 569 F.2d 1231 involved the propriety of allowing a publically funded legal services organization to collect legal fees under the Age Discrimination in Employment Act of 1967. The *Rodriguez* court observed that "[a]s a general matter, awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not

¹ Federal decisions regarding the private attorney general doctrine codified in statutes similar to section 1021.5 are of analogous precedential value. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639, fn. 29.)

obligated to compensate their counsel." (*Id.* at p. 1245.) But it also held that "since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel." (*Ibid.*) Here, where the fees have neither been paid by this client and have already been paid to counsel by another client, awarding fees to this client would constitute a double recovery.

Finally, plaintiffs draw this court's attention to *Brandenburger v. Thompson* (9th Cir. 1974) 494 F.2d 885, a case cited by *Rodriguez*. The *Brandenburger* court awarded private attorney general fees to the ACLU, which had represented the plaintiff pro bono. The court noted that entities providing legal services free of charge must be encouraged to bring public minded suits for litigants who cannot afford to pay by awards of legal fees. "Thus, an award of attorneys' fees to the organization providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant. [Citation.] Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant." (*Id.* at p. 889.) Here, however, counsel did not work pro bono.

Only one client paid fees. That client is discussed below. For the reasons express above, this court finds, based on *Torres, supra*, 234 Cal.App.4th at pp. 406-407, that awarding attorney's fees to Parker would not advance section 1021.5's purposes.

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: 1) he desired to initiate litigation before he sought funding for the litigation; 2) he had any material input into strategic decisions made in the litigation; or 3) he paid or is liable for any of the costs or fees incurred in this lawsuit. Pursuant to *Torres, supra*, 234 Cal.App.4th at pp. 406-407, he has not demonstrated his burden was out of proportion to his individual stake in the matter or that awarding attorney's fees to Stonecipher would advance section 1021.5's purposes.

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: 1) Able's desired to initiate litigation before Able's sought funding for the litigation; 2) Able's had any material input into strategic decisions made in the litigation; or 3) Able's paid or is liable for any of the costs or fees incurred in this lawsuit. Pursuant to *Torres, supra*, 234 Cal.App.4th at pp. 406-407, Able's has not demonstrated its burden was out of proportion to its individual stake in the matter or that awarding attorney's fees to Able's would advance section 1021.5's purposes.

D. RTG 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, RTG will no longer be able to sell to residents of California after January 1, 2018.

Giles declares that "[a]ny pecuniary interest reaped by RTG's is substantially outweighed by the costs of bringing this litigation" and "[t]he necessity of pursuing this lawsuit placed a burden on RTG's that was out of proportion to any financial stake in this case." Once again, Giles does not indicate that: 1) RTG desired to initiate litigation before it sought funding for the litigation; 2) RTG had any material input into strategic decisions made in the litigation; or 3) RTG paid or is liable for any of the costs or fees incurred in this lawsuit. Pursuant to *Torres, supra*, 234 Cal.App.4th at pp. 406-407, RTG has not demonstrated its burden was out of proportion to its individual stake in the matter or that awarding attorney's fees to RTG would advance section 1021.5's purposes.

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.

Bauer does not indicate that: 1) Herb Bauer desired to initiate litigation before it sought funding for the litigation; 2) Herb Bauer had any material input into strategic decisions made in the litigation; or 3) Herb Bauer paid or is liable for any of the costs or fees incurred in this lawsuit. Pursuant to *Torres, supra*, 234 Cal.App.4th at pp. 406–407, Herb Bauer has not demonstrated its burden was out of proportion to its individual stake in the matter or that awarding attorney's fees to Herb Bauer would advance section 1021.5's purposes.

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.

According to Dember, 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. Petitioners' counsel made an offer of proof at the time of the hearing that the CRPA Foundation was "not significantly or even much at all supported by any types of businesses at all" and offered the membership records for review in camera.

A nonprofit corporation must be viewed as having a financial stake to the same extent as its members, rather than simply as a conduit for its members' interests. (*California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1473 (*Matosantos*).)

Taking counsel's representations at face value, the CRPA Foundation would appear to have either no, or negligible, financial interest in this litigation. Moreover, unlike the individual plaintiffs in this litigation, CRPA Foundation did apparently have a role in deciding to bring the litigation, paying for the litigation, and controlling the course of the litigation. In other words, the litigation would not have happened without the CRPA Foundation's participation and support.

Accordingly, it would be appropriate for the CRPA Foundation to recover the sum of money it contributed to the attorney's fees for this case. The CRPA Foundation shall serve and file documentation evidencing the total amount it contributed to the fees and costs paid in support of this litigation by December 5, 2017. Defendant may file and serve a response to such evidence by December 20, 2017. Plaintiffs may file and serve a reply by December 28, 2017. The court sets a further hearing on this matter for Wednesday, January 10, 2018 at 3:30 p.m. in Department 402.

While the CRPA Foundation may have negligible corporate and business membership, the same cannot be said of the NRA.²

It may be said that the NRA "had a financial stake in this matter to the same extent as its members. As a membership association, it may be inferred '[NRA's] very existence depends upon the economic vitality of its members and any benefit or burden derived by [NRA] from this lawsuit ultimately redounds to the membership.' " (*Matosantos, supra*, 212 Cal.App.4th at p. 1480.)

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. The NRA's donors include these types of entities. (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].)

Yet neither the NRA nor these donors chose to take part in this litigation due, apparently, to the public's likely perception of their involvement. This was the NRA's choice, to not be a party, to not provide attorney services directly, to only fund the litigation through a joint legal action project and to direct the law suit's progress from off stage. This choice precludes an award of attorney's fees to the NRA.

Issued By: _____

(Judge)

on

11/29/2017

(Date)

² <https://www.nraringoffreedom.com/guide-to-giving/ways-to-donate/corporate-partners/>