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

SHERIFF CLAY PARKER; HERB BAUER SPORTING GOODS; THE CRPA FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; and STEVEN STONECIPHER, Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA; XAVIER BECERRA, in his official capacity as Attorney General for the State of California; and the CALIFORNIA DEPARTMENT OF JUSTICE, Defendants and Respondents.	Case No. F064510

APPELLANTS' REPLY BRIEF

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

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INTRODUCTION

Under California Code of Civil Procedure section § 1021.5, fees are recoverable "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter." (*Woodland Hills Residents Assn., Inc. v. City Council of L.A.* (1979) 23 Cal.3d 917, 941 (*Woodland Hills*), quotation omitted.) A fee award is proper unless "the expected value of the litigant's own monetary award [, discounted by the likelihood of success,] *exceeds by a substantial margin* the actual litigation costs." (*L.A. Police Prot. League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 10 (*L.A. Police Prot. League*), italics added; see also *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215-1216.)

Parker's opening brief thoroughly explains, with citation to the record, that no plaintiff's personal interest came anywhere close to the costs of litigating this complex constitutional challenge. It also explains why, even if the business plaintiffs stood to realize some financial gain from their victory, such is not the sort that disqualifies them from fee recovery under 1021.5.

The State's response is full of flimsy insinuation that Plaintiffs are misrepresenting their financial interest in this lawsuit. It ignores controlling authority that would compel an award of fees. And it greatly mischaracterizes the interests, both pecuniary and nonpecuniary, served by this lawsuit—minimizing the critical importance of the constitutional rights vindicated by Parker's victory to both the named plaintiffs and all those who

would seek to buy or transfer ammunition in California. Ultimately, it does little to respond to Parker's well-supported argument that no plaintiff harbored a disqualifying pecuniary interest in this case and that the lower court abused its discretion in denying section 1021.5 fees.

This Court should therefore reverse the trial court's order and grant a reasonable fee award. Alternatively, it should reverse and remand for further proceedings consistent with this Court's decision.

ARGUMENT

I. COMMENTS ON THE TRIAL COURT'S RECENT ORDERS REGARDING PARKER'S MOTION FOR FEES ON APPEAL

On September 13, 2017, the Fresno Superior Court issued a temporary order denying Parker's motion for attorneys' fees on appeal, holding that Parker had not established that any named party bore *personal financial responsibility* for the litigation and, so, could not establish that the burden of private enforcement outweighed any party's financial stake in the case. (Req. Jud. Ntc., Ex. A, pp. 8-9, discussing *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 406-407.)[1] Having been presented with the sorts of pecuniary interest evidence that Parker sought to

[1] The trial court also signaled that it would deny the motion as to The CRPA Foundation on the further ground that the organization had not submitted sufficient evidence of various types of corporate donors, including "gun manufacturers," who are not ammunition shippers but might have lost profits under the challenged provisions. (Req. Jud. Ntc., Ex. A, p. 11.) At the hearing on the matter, Parker's counsel directed the court's attention to record evidence establishing little support from *any* corporate donors. (*Id.*, Ex. B, p. 24.)

introduce in 2011, the trial court seemingly abandoned the fight that Parker, Stonecipher, RTG, Able's, and Herb Bauer might have reaped sufficient financial benefits to overcome their entitlement to fees. (*Id.*, Ex. A, pp. 8-10.) Rather, the trial court summarized that evidence—which established, at most, only minor financial interests—and labeled it "immaterial" to the burden analysis. (*Id.*, Ex. A, p. 9.)

On November 29, 2017, the court issued an Order After Hearing, partially granting Parker's motion. (Req. Jud. Ntc., Ex. B, p. 18.) The court maintained its position that *Torres v. City of Montebello* demands that named parties bear personal responsibility for fees to recover. (*Id.*, Ex. B, pp. 19-23.) But it reversed course on The CRPA Foundation's entitlement, stating that:

> [T]he 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 this litigation, paying for the litigation, and controlling the course of the litigation. In other words, the litigation would not have happened without [T]he 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.*

(*Id.*, Ex. B, pp. 23-24, emphasis added.) The court ultimately limited Parker's recovery to "the sum of money [The CPRA

Foundation] contributed to the attorney's fees for this case." (*Id.*, Ex. B, p. 16.)[2]

The trial court's orders rely heavily on *Torres v. City of Montebello*, a case from the Second District, that denied fees where an individual taxpayer sought to nullify a local government contract that hadn't been properly endorsed. There, the court denied fees because they were covered by a third-party business association, the Los Angeles County Environmental Business Association, which was made up of the winning contractor's competitors and whose very purpose was to serve those business' interests. (234 Cal.App.4th at pp. 406-407.) And Torres, the named plaintiff, stood to gain nothing but the satisfaction of seeing the rules for local government contracts enforced. (*Id.* at p. 407.) Because the factual record suggested that "the named plaintiff [was] litigating the action primarily for the benefit of nonlitigants with a financial interest in the outcome," *id.* at p. 405, the court found Torres "had no financial interest in the outcome, either from a benefit point of view *or from a cost point of view*," *ibid.*

The trial court here seems to apply *Torres* as including a bright-line rule denying fees absent a showing that the litigant paid fees out-of-pocket. But the financial support of a third-party,

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[2] The trial court reasoned that any amount the National Rifle Association of America (NRA) paid was not recoverable because the organization "cannot be said" to have "negligible corporate and business membership." (Req. Jud. Ntc., Ex. B, p. 24, citing https://www.nraringoffreedom.com/guide-to-giving/ways-to-donate/corporate-partners/.) The trial court cites only NRA's *available* tiers of corporate sponsorship, not evidence of what corporations *actually* donate to the organization.

civil-rights organization—even one that fully assumes the costs of suit—cannot be enough to disqualify a party from private attorney general fees. To hold otherwise, would gut section 1021.5 and non-profit public interest litigation. Indeed, it ignores the great number of cases where litigants did not bear their own costs. (See e.g., *Otto v. L.A. Unified Sch. Dist.* (2003) 106 Cal.App.4th 328, 333 (*Otto*); *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1260 ["[N]either appellant is ineligible for an attorney fee award merely because the protective league is a union which may have absorbed all or most of the expenses of this appeal."]; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 316. See also *Rodriguez v. Taylor* (3d Cir. 1977) 569 F.2d 1123 [private attorney general fees when "authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel."]) As the court in *Otto v. Los Angeles Unified School District*, recognized: "the fact [that a party has not personally borne the burden of paying his attorneys] will not warrant denying him section 1021.5 fees. Section 1021.5 does not specifically require a plaintiff to bear his own fees. It simply speaks of the 'financial burden of private enforcement.' " (106 Cal.App.4th at p. 333.)

So, to the extent *Torres* suggests that plaintiffs must personally bear the "burden" of litigation costs, it must stand something far narrower than the trial court's broad reading. Perhaps, as *Torres* itself suggests, the rule applies when "the named plaintiff is litigating the action primarily for the benefit of nonlitigants with a financial interest in the outcome." (234

Cal.App.4th at p. 405, citing *Save Open Space Santa Monica Mountains v. Super. Ct.* (2000) 84 Cal.App.4th 235, 254 (*Save Open Space*).) For instance, when dealing with a third-party funder whose very purpose is to further the business interests of non-parties, *Torres*, *supra*, at pp. 407-408, or whose own existence relies on the economic viability of its members. (*Cal. Lic. Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570, 573 (*CLFA*).)

Here, the trial court's most recent order concedes that The CRPA Foundation does not have sufficient corporate backing to justify denying fees, but holds that the NRA's support of the litigation bars recovery of the costs it covered. (Req. Jud. Ntc., Ex. B, p. 24.) But the NRA is not an organization dedicated to the *business* interests of its supporters. (*CLFA*, *supra*, 30 Cal.App.4th at pp. 570, 573.) Its primary purpose is "[t]o protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen . . . to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use arms." (Guidestar.com, *National Rifle Association of America*, https://www.guidestar.org/profile/53-0116130 (last accessed Dec. 18, 2017), quoting NRA Bylaws, art. II.) And it cannot fairly be assumed that the NRA relies on the support of any firearms-related business such that its "very existence depends on the economic vitality of" such supporters. (Req. Jud. Ntc., Ex. B, p. 24, citing *Cal. Redevel.*

Assn. v. Matosantos (2013) 212 Cal.App.4th 1457, 1480.)[3] The facts of this case are simply not like the uncommon situation in *Torres*.

Parker mentions all this here because, even with the pecuniary interest evidence Parker sought to introduce in 2011, the trial court *still* would have denied fees (or a portion thereof) because it is under a mistaken belief that a party must have personally borne the burden of paying his attorney before fee recovery is proper.[4] If this case is remanded without first addressing this misconception, Parker's fee motion may very well be up on appeal again.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PARKER'S FEE MOTION

A. A Pragmatic Assessment of Parker's Fee Motion Confirms No Plaintiff Realized a Pecuniary Benefit Outweighing the Cost of Litigation

The State's entire argument is simply that, because Parker did not file additional evidence with his fee motion, he cannot recover section 1021.5 fees. (R.B. 14.) But the trial court is expected to make a "pragmatic" or "realistic assessment, in light

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[3] The NRA's 2015 IRS Form 990 states that only five percent of its annual contribution revenue comes from "companies and executives in the firearms, hunting, and shooting sports." (Req. Jud. Ntc., Ex. C., pp. 28, 80; *id.*, Ex. D, p. 152.) In 2015, that amount would have been about *$4,749,102*. (*Id.*, Ex. C., pp. 28, 39; *id.*, Ex. D, pp. 114, 152.) On the other hand, membership dues from "individual citizens" accounted for some *$165,664,978*. (*Id.*, Ex. C, pp. 28,39; 76; *id.*, Ex. D., p. 110.)

[4] Parker raises this issue for the first time on reply because the trial court's recent orders were issued in the months after Parker's opening brief was due. (A.O.B. 1 [filed Aug. 28, 2017]; Req. Jud. Ntc., Ex. A., p. 12 [issued Sept. 13, 2017]; *id.*, Ex. B., p. 24 [issued Nov. 29, 2017].)

of all the pertinent circumstances, of the gains which have resulted in a particular case" when considering entitlement to fees. (*Woodland Hills*, *supra*, 23 Cal.3d at p. 940; see also *Lesierson v. City of San Diego* (1988) 202 Cal.App.3d 725, 735 ['the court must critically analyze the surrounding circumstances of the litigation and pragmatically assess the gains achieved by a particular action"].) It is the rare case that requires further factual development, calling on "the court to make factual findings based on conflicting testimony." (*L.A. Police Prot. League*, *supra*, 188 Cal.App.3d at p. 8; see also 2 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2014 supp.) § 11.47, p. 11-49 (hereafter Pearl) Indeed, trial courts have been warned that fee requests should not result in a "second major litigation." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 437 (*Hensley*); see also Pearl, *supra*, § 11.46, p. 11-48.)

Here, logical inference and the complete record, including evidence filed in support of Parker's fee motion, clearly establish that no plaintiff stood to gain sufficient financial benefit to justify denying their attorneys' fees. (A.O.B. 40-41.) Appellants' Opening Brief sets forth in detail each party's lack of any disqualifying interest in this case. (A.O.B. 29-36.) To summarize, the record establishes that the individual plaintiffs, Parker and Stonecipher, are merely individuals who are not in the business of ammunition sales or shipping. (J.A.I 16, 18; J.A.VIII 2055) Nor did they seek or receive damages. (J.A.I 34-35; J.A.XIV 4059-4060.) They could thus gain nothing pecuniary—directly or indirectly—from participation in this lawsuit. (A.O.B. 30.) The

trial court's demand for further evidence of this obvious fact evinces anything but a pragmatic approach to determining their entitlement to fees.

The trial court's terse rejection of Parker's evidence that neither ammunition-shipper plaintiff stood to gain profits substantially greater than the cost of litigation displays a similar lack of pragmatism. Regarding RTG's financial interest, Parker submitted evidence showing that RTG made only about $2,190 from California sales in 2010 and thus its future profits would practically never match the cost of litigation. (A.A.II 244; see A.O.B. 35 [it would take over 400 years for RTG's California sales to equal litigation costs].) The court, faced with sworn testimony that RTG made less than $2,200 from California sales in 2010, refused to estimate the financial value of the case to RTG. (A.A.II 244.) Instead, it found the evidence lacking because RTG did not "provide the [c]ourt with any estimate of the financial benefits that success in this action yielded for Plaintiff." (A.A.II 250.) Though, practically speaking, it is hard to imagine how a business with such low-volume sales could ever support the financial burden of a multi-year, constitutional lawsuit costing hundreds of thousands of dollars.

Parker offered similar evidence on behalf of Able's, though it could not be presented with his motion papers for the reasons described in the declaration of attorney Sean Brady. (A.A.II 229, 240-241.)[5] The court did not address counsel's declaration that

[5] Evidence Parker sought to submit the day of the hearing confirmed that Able's pecuniary interest was less than $35,000 annually. (A.A.II 257-260, 280-283.)

plaintiffs could and would produce a declaration that Able's' annual profits paled in comparison to the attorneys' fees requested. (A.A.II 679.) Not that it would have mattered—as evidenced by the trial court's rejection of RTG's related statements. (See A.A.II 679.)

Herb Bauer, a brick-and-mortar retailer, stood to *lose* money when the *Parker* victory ensured that the store's competition from online and mail-order ammunition sellers would not be eliminated. (A.A.II 274-277.) The trial court summarily rejected this wholly logical conclusion, demanding affirmative evidence in support. (A.A.II 673-675.) Though, because the law never took effect, it would be hard (if not impossible) to prove with any greater reliability that AB 962 would have had that effect. Regardless, Herb Bauer is a seller of goods necessary to the exercise of constitutionally protected conduct whose only potential financial benefit would be both indirect and speculative—both factors counseling in *favor* of fee recovery. (A.O.B. 37-38, discussing *Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, 173 (*Aakhus*); *Galante Vineyards v. Monterey Penins. Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1127-1128 (*Galante*); *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 230-231 (*Citizens*).)

And finally, The CRPA Foundation is, primarily, an organization representing *individual firearm owners* to protect and preserve the Second Amendment. (J.A.I 17.) Its tens of thousands of individual supporters, J.A.I 17, like the individual plaintiffs, have *no* pecuniary interest in this litigation—a fact the State

ignores. Though some of its supporters may be ammunition-related businesses, J.A.I 17, it is *not* an organization devoted to *anyone's* financial interests. Nor can it be said that the livelihood of The CRPA Foundation depends on the economic viability of the few of its supporters who also happen to be ammunition shippers or retailers. (See *CLFA*, *supra*, 30 Cal.App.4th at pp. 570, 573.) *For the clear majority of its supporters are financially uninterested individuals*. (A.A.II 612-613, 653-655, 658-659.) But even if The CRPA Foundation could be said to share a financial interest with its business entity supporters, such an interest would be speculative, indirect, and equally shared with their non-retailer customers. (A.O.B. 40, citing *Aakhus*, *supra*, 14 Cal.App.4th at p. 173; *Galante*, *supra*, 60 Cal.App.4th at pp. 1127-1128; *Citizens*, *supra*, 181 Cal.App.3d at pp. 230-231.)

In sum, a realistic assessment of the entire record, as well as logical and legal argument, plainly establish that no plaintiff harbored a disqualifying pecuniary interest in the outcome of this case. The trial court abused its discretion when it denied section 1021.5 attorneys' fees, holding that Parker was required to submit additional affirmative evidence as to every plaintiff's pecuniary interest. As described further below, the State's brief does nothing to alter that conclusion.

B. The State's Insinuation that Parker's Fee Motion Contradicted the Parties' Earlier Statements Mischaracterizes Parker's Arguments

In making its case for affirmance, the State repeatedly mischaracterizes plaintiffs' pecuniary interest arguments in

support of their fee motion, creating the appearance that those arguments contradicted the parties' earlier record statements. (R.B. 15-17.) When read as they were intended, however, Parker's arguments establish that no plaintiff had a disqualifying pecuniary interest—and that the parties' prior statements regarding the relative burdens of AB 962 can coexist with that conclusion.

First, the State argues that Parker argued below that no business plaintiff had a "significant financial stake in the litigation." (R.B. 15-17, citing A.A.I.38.) Not so. Rather, Parker argued that, whatever financial interest the business plaintiffs might have had, it was insufficient to overcome their fee claim under the valuation method laid out in *Los Angeles Police Protective League*. (A.A.II 228-231.) That is, Parker argued that no business plaintiff's expected financial gain "exceed[ed] by a substantial margin the actual litigation costs." (A.A.II 230.)

The distinction is an important one because the State's brief repeatedly suggests that the business plaintiffs' prior statements established they each had a "significant financial stake," and that their fee motion claimed otherwise. (R.B. 15-17.) Even if that is what Parker argued, "significant financial stake" is not the test. As Parker's opening brief explains, a pragmatic approach to this case, considering the entire record, logic, case law, and the evidence submitted in support of Parker's fee claim, wholly supports a finding that no party's pecuniary interest substantially exceeded the costs of litigation. (A.O.B. 28-40; see also Part I, *supra*.)

Second, the State suggests that the statements made by each plaintiff in support of their fee motion contradict earlier statements made either in the complaint or in support of their 2010 motions. (R.B. 18.) For instance, the Respondents' Brief highlights a 2010 statement from Herb Bauer claiming it would be "costly and burdensome" to comply with the challenged statutes. (R.B. 16, citing R.A. 48 [J.A. VIII 2067].[6]) It also quoted the shipper plaintiffs as declaring they would cease ammunition shipments to California and lose "significant" profits owing to the vague laws' enforcement. (R.B. 15-16, citing R.A. 42, 46 [J.A. VIII 2063].)

But nothing about those prior statements contradicts Parker's argument that plaintiffs' anticipated financial benefits did not significantly outweigh the cost of litigation. Indeed, Bauer declared simply that he believed compliance with the record-keeping requirements would be "burdensome" and "costly." (R.A. 48 [J.A.VIII 2067].) That belief says nothing about how profitable his business would have been had the challenged laws taken effect. Bauer never estimated the anticipated cost of record-keeping in his 2010 declaration. (R.A. 48 [J.A.VIII 2067].) Nor did he expand on what he meant by "costly and burdensome." (R.A. 48 [J.A.VIII 2067].) Surely, it is not "insignificant" to ask a small business to create and store ammunition sales records for five

[6] The State includes in its Respondents' Appendix various documents available in the *Parker v. California*, Case No. F063490, Joint Appendix, which was incorporated into Appellants' Appendix by reference. (A.A.I 17.) For the Court's ease of reference, Parker provides citations to both.

years. (Pen. Code, § 30355.) That does *not* mean that the cost of compliance would have exceeded the cost of litigation "by a substantial margin." (*L.A. Police Prot.*, *supra*, 188 Cal.App.3d at p. 10.)

Nor do the shipper plaintiffs' allegations that the challenged laws would have caused "a significant decrease in sales and lost profits," R.B. 14-15, cast doubt on the estimated profits that these businesses presented below. Indeed, a "significant" loss of profits is a relative term. While their reply and supporting documentation claimed combined profits of no more than $37,000 annually, that does not mean that forgoing those profits would not have been a "significant" loss for their businesses. And it does not establish that either shipper's personal financial interest substantially exceeded the cost of litigation. (See *L.A. Police Prot.*, *supra*, 188 Cal.App.3d at p. 10.)

As for The CRPA Foundation, the State focuses on the organization's allegation that it has business entity supporters who could face criminal prosecution for unknowing violations of the challenged provisions. (R.B. 17, citing R.A. 20, 31 [J.A.I 17, 28].) But the State ignores that, on the record, The CRPA Foundation also alleged it brought this action on behalf of the "tens of thousands" of individual supporters who, like Stonecipher, only sought to purchase and transfer ammunition. (R.A. 20 [J.A.VIII 2055].) So, while a minority of The CRPA Foundation's supporters might have had some financial interest in this suit, A.A.II 612-613, 653-655, 658-659, Parker's legal arguments established why any such interest could not be fairly

imputed to the Foundation, A.A.II 230-231, 611-613; A.O.B. 39-40. For that reason, The CRPA's 2010 allegation that its business supporters would be harmed by AB 962 does not conflict with its later claims that the organization did not have sufficient pecuniary interest to justify denying fee recovery.

C. The State Ignores Parker's Discussion of Relevant Case Law Establishing that a Fee Award Is Appropriate

The State concedes that the individual plaintiffs had no financial stake in this case, R.B. 18, fn. 2., and its entire discussion of the business plaintiffs' pecuniary interest is devoid of any reference to relevant case law or a discussion of the authorities Parker raises in his opening brief. (R.B. 14-19.) Again, even assuming the financial interests of RTG, Able's, Herb Bauer, or any business supporter of The CRPA Foundation came anywhere close to the cost of litigation, an award of section 1021.5 fees would *still* be appropriate. (A.O.B., pp. 31-34, 37-38, 40.) For the business plaintiffs would, at most, reap only an indirect, speculative financial award. (A.O.B. 33, 38, 40, discussing *Galante*, *supra*, 60 Cal.App.4th at p. 1127; *Citizens* , *supra*, 181 Cal.App.3dat pp. 230-231.) And, as purveyors of constitutionally protected goods and services, these parties share "mutual and inseparable" nonpecuniary interests with their customers. (A.O.B. 31-32, 37, 40, discussing *Aakhus*, *supra*, 14 Cal.App.4th at pp. 167-169, 173.) Both arguments stand without further building an evidentiary record.

Again, the lack of any direct financial benefit flowing from their win in this case counsels in favor of plaintiffs' fee recovery.

(*Galante*, *supra*, 60 Cal.App.4th at p. 1127; *Citizens*, *supra*, 181 Cal.App.3d at pp. 230-231.) As the ammunition-shipper plaintiffs' declarations below explain, ammunition market factors, as well as the Legislature's repeated (and ultimately successful) attempts to undo Parker's win, made it impossible to properly quantify at the outset of litigation any potential financial benefit the business plaintiffs could have realized. (A.O.B. 34, citing A.A.II 244, 410, 417-418 456-477 [two bills introduced in state legislature to moot Parker's lawsuit] and Sen. Bill No. 1235 (2015-2016 Reg. Sess.) [clarifying legislation passed in 2016 applying AB 962 to all ammunition]; A.O.B. 38, citing A.A.II 408-409, 458-466, 470-475; A.O.B. 40.) They certainly could not establish that any such interest *substantially* outweighed the costs of litigation. The State does not attempt to distinguish *Galante* or *Citizens*, both of which counsel in favor of an award.

Further, like the abortion providers in *Planned Parenthood v. Aakhus*, the business plaintiffs here share a "mutual and inseparable" interest in the right to transact in constitutionally protected goods or services with the public. (A.O.B. 31-32, 37, 40, citing *Aakhus*, *supra*, 14 Cal.App.4th at pp. 167-169, 173.) That is, the right of the business plaintiffs to *sell* ammunition, free from the threat of arbitrary and discriminatory enforcement, cannot be disentangled from the right of Californians to *purchase* it. As such, even if they had sufficient business motives to challenge AB 962, this is simply not a case of a "self-serving, private dispute commenced by [Plaintiffs] to protect [their] pocketbook[s]." (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173.) A fee

award is appropriate. Again, the State ignores *Aakhus*, which clearly supports fee recovery in this case.

D. The State Overstates the Financial Interests of the Business Plaintiffs, While Minimizing the Importance of the Nonpecuniary Interests the Litigation Served

In the end, the State states that the interests pursued in this litigation as "not coterminous," suggesting that any nonpecuniary interest was eclipsed by the financial interests at stake. (R.B. 18.) It does so by claiming that the record reveals (only) two interests here: (1) the protection of "the financial interests of four of the six [p]laintiffs who had interests in shipping ammunition," and (2) otherwise undescribed "nonpecuniary interests of two individual plaintiffs." (R.B. 18.) It is hardly a fair representation.[7]

As an initial matter, the record does not establish that "four of the six" plaintiffs "had interests in *shipping* ammunition." (R.B. 18, italics added.) Herb Bauer is a brick-and-mortar store; it does not ship ammunition. (J.A.I 16; J.A.VIII 2067-2068.) And, while the record isn't entirely clear which sorts

[7] Interestingly, the State makes this factual claim, having reviewed countless sworn declarations attesting that the business plaintiffs anticipated and obtained exceedingly little, if any, financial gain. (A.A.II 244, 280-281, 285-287, 479-481, 484-485 [RTG and Able's]; A.A.II 275-276, 493-494 [Herb Bauer]; A.A.II 294-295, 498-499, 561-563, 567-569, 612, 653-655, 658-660 [The CRPA Foundation]; Req. Jud. Not., Ex. A., pp. 9-10; *id*, Ex. B., pp. 21-23.) It also had the benefit of the trial court's recent discussion of that evidence—which, for the most part, no longer fights the conclusion that these plaintiffs had minimal business incentive to sue. (Req. Jud. Not., Ex. A, pp. 9-10 [trial court's September 13, 2017 tentative ruling denying fees on appeal]; but see *id.*, Ex. A, pp. 11-12 [still questioning The CRPA Foundation's pecuniary interest].)

of "licensed business enterprises" support The CRPA Foundation, it stands to reason that, to the extent it is supported by ammunition businesses, the California-based nonprofit would be supported more significantly by in-state ammunition retailers, like Herb Bauer. So really, only two of the four plaintiffs "had [any] interest[] in shipping ammunition." (R.B. 18.)

More importantly, however, *all six plaintiffs shared vital nonpecuniary interests in the outcome of this suit*. Both the record and case law are clear. Again, the individual plaintiffs simply sought to exercise their fundamental rights to acquire ammunition free from the threat of unfair criminal prosecution under the unconstitutionally vague AB 962. (J.A.I 14.) The CRPA Foundation, representing some 30,000 individual members and supporters who simply sought "to purchase and transfer ammunition," J.A.I 17, participated to serve the same nonpecuniary, public interest. Similarly, because RTG, Able's, and Herb Bauer are each purveyors of goods necessary to the meaningful exercise of the Second Amendment, they inextricably share the constitutionally protected (nonpecuniary) interests of their customers to acquire ammunition free from the threat of vague criminal laws. (*Aakhus*, *supra*, 14 Cal.App.4th at p. 173.) What's more, the lawsuit also served the nonpecuniary interests of millions of Californians in the market to purchase ammunition.

Far from being insignificant in comparison to whatever financial stake the business plaintiffs may have had, significant nonpecuniary interests *dominated* this case. And, because those

interests were in vindicating constitutional rights and enforcing "the fundamental public policy that no person should be deprived of life, liberty, or property without due process of law," they were *necessarily* substantial. (A.A.II 677.) So even if the question of the business plaintiffs' financial interest was a close one, in order to encourage public interest litigation, the trial court should have been "more willing to award fees" here. (Pearl, *supra*, § 3.67, p. 3-67, citing *L.A. Police Prot.*, *supra*, 188 Cal.App.3d at p. 10.)

In sum, Parker's opening brief clearly establishes that the financial *burden* of litigating this case far outweighed any potential financial *benefit* the parties could have anticipated. Nothing in the State's responsive brief diminishes that conclusion. For it relies on mere insinuation, it ignores important, controlling authority, and it mischaracterizes the interests championed by this lawsuit. The Court should reverse the denial of Parker's fee motion and, for the reasons described below, grant plaintiffs a reasonable fee award. Alternatively, the Court should reverse and remand for further proceedings.

III. ALTERNATIVELY, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PARKER'S ATTEMPTS TO SUPPLEMENT THE RECORD

While a court has the power to control its schedule of proceedings and limit the introduction of evidence after briefing has been done, it must be emphasized that courts should favor the resolution of matters on the merits whenever possible, and that courts should . . . reject . . . strict adherence to procedural rules whenever the purposes of justice require. (*In re. Marriage of*

Woolsley (2013) 220 Cal.App.4th 881, 905, quoting *Adams v. Sharp* (1964) 61 Cal.2d 775, 777 (Murray, J., concurring).)

The State has not made any serious or rigorous attempt to distinguish the legal basis of this argument. At most, it needlessly points out that the cases Parker relies on are factually distinguishable. (R.B. 20.) But all cases have distinguishable facts. The point is whether those differing facts make the authority legally distinguishable, or whether the rules they produce can be applied to analogous matters—something the State does not elaborate on here. (See R.B. 20-21 [describing the facts of each case, but failing to explain why those differing facts matter to the legal analysis and application to this case].)

Terminating sanctions are usually held to be an abuse of discretion. (*Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161-1162.) Rejecting Parker's motions to supplement the record and, consequently, denying his entire fee claim was equivalent to a sanction terminating the action in favor of the defendant. (See *id.* at pp. 1161-1162; *Sec. Pac. Natl. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 94, 97-99 (*Sec. Pac.*).) So, in furtherance of justice, absent a showing that plaintiffs engaged in a willful violation of the rules or had a history of dilatory conduct or that the State would have been unduly prejudiced by submission of the evidence, the trial court should have accepted plaintiffs' belatedly filed papers. (A.O.B. 42-47.)

Parker's opening brief points to *Security Pacific*, which involved a defendant's failure to file an adequate separate statement in support of summary judgment. (See *Sec. Pac.*,

supra, 4 Cal.App.4th at p. 92-93.) The court held that the violation was a presently curable defect, the correction of which would not unduly harm the opposing party. (See *id.* at p. 96.) As here, there was no showing of dilatory conduct or prior abuse of procedure, and thus the court held that the trial court abused its discretion in denying defendants the opportunity to correct the deficiency. (*See id.* at p. 93).

The State seeks to distinguish *Security Pacific*, stating that the judgment entered in favor of the plaintiff was reversed only because the pro per defendant's failure to file a separate statement in opposition to the bank's second summary judgment motion was not willful. (R.B. 20, citing *Sec. Pac.*, *supra*, 4 Cal.App.4th 89, 98.) The State seemingly assumes that a lack of willfulness is the sole factor in determining whether the imposition of effective sanctions on procedural grounds is an abuse of discretion. This is incorrect. Rather, *Security Pacific* holds that:

> Terminating sanctions have been held to be an abuse of discretion unless the party's violation of the procedural rule was willful . . . or, if not willful, at least preceded by a history of abuse of trial procedures, or a showing less severe sanctions would not produce compliance with the procedural rule.

(4 Cal. App. 4th at p. 98, internal citations omitted.) It is clear that the court has outlined not one, but several situations in which sanctions can be an abuse of discretion. The main concern the court had was ensuring that justice was done, and the rule is designed to be broad in order to achieve that result.

The State similarly attempts to narrow the *Security Pacific* holding, as endorsed by *Kalivas v. Barry Controls Corporation*, that an order based upon a "curable procedural defect" that does not prejudice the other party, yet results in substantial injustice to the party in error, is an abuse of discretion. (R.B. 20, citing *Kalivas*, *supra*, 49 Cal.App.4th at p. 1162.) Once again, the State doesn't address the merits of the holding itself, but simply suggests it is inapplicable here because, in *Kalivas*, summary judgment was reversed because the opposing party was merely "misled by an unauthorized courtroom rule." (R.B. 20, citing *Kalivas*, *supra*, 49 Cal.App.4th at p. 1162,) The State's impossibly narrow reading of the case ignores the fundamental purpose of the rule it supports—that is, to serve the ends of justice whenever possible. (*Id.* at p. 1161.) If the court wanted to narrow the rule to extend clemency only to those who had been "misled," it could have done so. But the courts have easily recognized, in what could scarcely be called great wisdom, there is more than one "curable procedural defect" out there.

Finally, in *Farber v. Bay View Terrace Homeowners Assoc.* (2006) 141 Cal.App.4th 1007 (*Farber*), the defendant (who had prevailed in a plaintiff homeowner's suit), filed a motion for its attorney's fees as provided by contract. Defendant's counsel provided a declaration stating only the total hours spent on the case and his hourly billing rate. (*Id.* at p. 1014.) Plaintiff objected, and the trial court denied the fee motion "without prejudice on the grounds that [Defendant] did not supply the court with sufficient information to determine whether the fees were

"reasonable and necessary." (*Id.* at p. 1015.) The appellate court affirmed. (*Id.* at 1014-1015.) *Farber* matters here because it (once again) stands for the principle that the court should pursue the goal of substantial justice, and not merely sanction plaintiffs for procedural errors. The State points out that "[n]o court is required to grant a litigant a second or third bite of the apple." (R.B. 21.) But *Farber* invited the parties to correct the errors in the name of avoiding injustice.

Here, Parker's belated requests to supplement the record were based not on a willful disregard for the procedures, but on counsel's "failure" to perceive that the trial court would require far more evidence than is generally required to establish entitlement to fees.[8] (A.A.II 252-254, 307-310, 312-318, 405-411, 415-419, 516-517, 552-553, 556-557.) And because accepting Parker's evidence invited no harm upon the State that could not have been remedied by offsetting Parker's fee award, the court should have followed the approach set out in *Farber*, either by accepting Parker's supplemental evidence, or by denying the motion without prejudice and allowing the parties the opportunity to refile and correct the error. (141 Cal.App.4th at p. 1015.)

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[8] E.g., evidence further corroborating the fact that the individual plaintiffs could recover no financial gains in the face of a clear record establishing the same; evidence of the shipper plaintiffs' direct estimate of pecuniary value rather than evidence of annual profits from which the court could calculate that value; evidence corroborating a logic-based argument that brick-and-mortar stores stood to lose money by the invalidation of AB 962, which would have eliminated substantial competition. (A.A.II 678-679.)

To the extent the Court is not satisfied that Parker met his burden absent the supplemental evidence, and because that evidence clearly establishes that no plaintiff had a disqualifying pecuniary interest, A.O.B. 49-50, the Court should reverse the order denying fees and hold that Parker is entitled to a reasonable fee award. Alternatively, the Court should remand, directing the trial court to accept Parker's evidence and reevaluate his entitlement to section 1021.5 fees.[9]

IV. THE COURT SHOULD CALCULATE PLAINTIFFS' FEE AWARD TO AVERT YET ANOTHER APPEAL

The Court has the authority to calculate fee awards itself rather than remanding the case to the trial court. (*Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1267.) Although this power is rarely exercised, this is the unusual case that warrants it. For it is necessary here to prevent the need for further costly appeals, conserving the resources of both the courts and the parties. (Pearl, *supra*, § 12:13, p. 12-9.)

In *Mann v. Quality Old Time Services* (2006) 139 Cal.App.4th 328 (*Mann*), the appellate court found that it was appropriate to calculate fees itself where it had a thorough knowledge of the underlying case and was familiar with the work

[9] Based on the trial court's most recent rulings, the court is likely to find the evidence "immaterial" absent evidence of each plaintiff's financial support of the litigation. (See *supra*, Part I, pp. 7-9.) As explained above, remand to the trial court to weigh the evidence of pecuniary interest, without clarifying whether a party must bear his own costs, is likely to result in yet another appeal of this matter. (*Id.* at p. 12.)

of the attorneys. (*Id.* at p. 346.) The court found that due to issues with the trial court, remanding the case for calculation of fees was undesirable as it would spawn wasteful litigation, thus the court found it preferable to calculate the fees itself. (*Ibid.*) The United States Supreme Court has held that a request for attorney's fees should not spawn additional major litigation, this suggests an overarching principle of promoting judicial economy in resolving fee matters. (*Hensley*, *supra*, 461 U.S. at p. 437.)

Looking at this case's history, it is likely that remanding the case will merely spawn further appeals. And there has already been significant appellate work generated in this matter. Indeed, this Court has already heard the State's appeal on the merits, as well as the State's appeal regarding Parker's entitlement to certain costs and, now, Parker's appeal regarding entitlement to attorneys' fees for trial work. Based on the trial court's recent Order After Hearing, partially denying Parker's motion for appellate fees on dubious grounds, Req. Jud. Ntc., Ex. B, pp. 21-24, the Court may soon see another appeal regarding entitlement to and the amount of fees on appeal.

Should the Court opt not to calculate Parker's trial fee award itself, based on the trial court's clear reluctance to award Parker the full amount of fees to which he is entitled, the Court will very likely see this case yet again—for a total of *five* appeals in this matter alone. An exercise of the Court's power here could avert further appeals, which is in keeping with the overarching principle of judicial economy in fee disputes. (*See Hensley*, *supra*, 461 U.S. at p. 437; *Buckhannon Bd. & Care Home, Inc. v. W. Va.*

Dept. of Health & Human Res. (2001) 532 U.S. 598, 609; *Tex. State Teachers Assn v. Garland Indep. Sch. Dist.* (1989) 489 U.S. 782, 791.)

What's more, the Court is well-equipped to fairly assess the fee amount here. Much like the court in *Mann*, the Court is familiar with the underlying litigation and with the work of the attorneys. (139 Cal.App.4th at p. 346.) And the Court has access to all information necessary to make the fee calculations. The record includes competent, thorough evidence supporting Parker's fee request, including the lead attorney's sworn declaration detailing all claimed hours and services provided, A.A.I 87-121, as well as attorney declarations attesting to the reasonableness of the rates sought and the hours worked, A.A.I 47-141. The State complains that the record on appeal does not include Parker's attorneys' billing slips. (R.B. 21.)[10] But it is well-established that such records are not required in order to fully document a fee claim. For the sworn declaration of counsel is sufficient to establish the hours spent and costs incurred. (Pearl, *supra*, § 9.83, p. 9-70 ["The California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done."]; see, e.g., *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 fn. 4; *Hadley v. Krepel* (1985) 167 Cal.App.3d

[10] Parker was left in the unenviable position of having to omit the billing slips from Appellants' Appendix because they were lodged (rather than filed) below because the trial court ordered Parker to submit them unredacted "in any way"—including to protect matters protected by the attorney-client privilege. (A.A.II 358; A.A.II 370.)

677, 682; *Horsford v. Bd. of Trustees* (2005) 132 Cal.App.4th 359, 396.) Again, the declaration of Clinton B. Monfort provides detailed testimony regarding the number of hours reasonably billed, explaining the factors that led counsel to bill the hours it did. (A.A.I 87-121).[11] The Court is within its power to review Mr. Monfort's declaration, as well as the supporting declarations of his colleagues, and calculate a reasonable fee award, obviating the need for remand and potential future appeals.

CONCLUSION

For the foregoing reasons, Parker respectfully requests this Court reverse the trial court's denial of Plaintiffs' Motion for Attorneys' Fees and grant a reasonable award of fees or remand with instructions to set an appropriate award.

Alternatively, Parker asks the Court to reverse the trial court's denial of Plaintiffs' requests to supplement the record and remand with instructions that the trial court accept Parker's evidence and re-evaluate his entitlement to section 1021.5 fees.

Date: December 19, 2017 **Michel & Associates, P.C.**

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs-Appellants

[11] Contrary to the State's claim, R.B. at p. 20-21, the court did not *hold* that the Monfort declaration was insufficient. (A.A.II 359.) Having held that Parker was not entitled to an award, the court never analyzed the reasonableness of Parker's fee request. (A.A.II 672-681.) The State, like Parker, can only speculate as to why the trial court ordered Parker to submit those bills.

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Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Appellants' Opening Brief is 1 ½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 7,000 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Date: December 19, 2017 **Michel & Associates, P.C.**

s/ Anna M. Barvir
Anna M. Barvir
Counsel for Plaintiffs-Appellants

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