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' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE REPLY BRIEF

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

C. D. Michel – SBN 144258
Anna M. Barvir – SBN 268728
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
E-mail: cmichel@michellawyers.com

Counsel for Plaintiffs-Appellants

INTRODUCTION

Relying almost entirely on its arguments opposing Appellants' Request for Judicial Notice, the State moves to strike Appellant's Reply Brief in whole or in part. The State merely says as a matter-of-fact that, because the documents Parker seeks to introduce were not part of the record below, they are irrelevant to the appeal and Parker's arguments relying on them should be stricken. But the State has not explained why the documents' absence from the record renders the arguments or evidence irrelevant or unworthy of submission. It has made no effort to engage with the arguments made in Parker's Reply Brief. And it does not explain why consideration of Parker's argument, contained to a single section of his Reply Brief, would so disrupt the orderly course of this appeal that the extraordinary step of striking his entire brief would be appropriate.

Thus, the State employs the discredited strategy of proof by assertion, of circular reasoning, and "talking points." The Court should not countenance such arguments. The State's motion should be denied.

ARGUMENT

As Parker's Motion for Judicial Notice has stated, all of the documents proffered are either official acts and records of a court in the State of California, or official records of an administrative agency of the federal government. (Appellants' Req. Jud. Ntc. at pp. 3-6; citing Cal. Evid. Code § 452 subd. (c)-(d). See e.g., *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 605 [holding that an attorney's declaration is part of a trial court's file

and thus a judicial record of which permissive judicial notice could be taken."]; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518 ["official acts" including reports and records of administrative agencies have been given judicial notice under Evidence Code section 452.].) They are all publicly available for any who might wish to view them. (Appellants' Req. Jud. Ntc. at p. 6.) None of the contents of the documents are reasonably subject to dispute. (*Id.* at pp. 4, 6-7 [citing *Lockley v. Law Office of Cantrell, Green* (2001) 91 Cal.App.4th 875, 882; *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 575. See also *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265 [SEC filings accessible on agency websites are judicially noticeable and are not subject to reasonable dispute.].) They are therefore highly qualified to be judicially noticed under Evidence Code section 452. The State does not attempt to dispute this obvious conclusion. Instead, it simply claims that the documents and Parker's arguments relying on those documents are irrelevant on appeal because they were not before the trial court below.

Relevant evidence "means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) It is commonly considered the *fundamental threshold* for admission. This threshold is not very high; *any* tendency to prove or disprove a dispute is sufficiently relevant to get before a court. (See *People v. Hess* (1951) 104 Cal.App.2d 642, 676.) At its core, this appeal asks whether the trial court abused its discretion in denying Parker's request for attorneys' fees on the grounds that

he had not established the absence of a disqualifying pecuniary interest. (A.O.B. 19, 21.) The State disputes that there was any abuse of discretion and that the trial court acted properly in denying fees. (R.B. 13-19.) Therefore, the trial court's recent opinions relating to this question are all *highly* relevant to this appeal. It is these opinions which are being submitted for judicial notice.

They are relevant because they involve the same parties in dispute over Parker's entitlement to fees. They are relevant because they evince an intention to deny fees for reasons that were so improper and outside the color of law that the trial court was forced to backtrack and resubmit. (Tentative Ruling, *Parker v. State of California*, Case No. 10CECG 02116, filed September 13, 2017 ["Tentative Ruling"]; Order After Hearing, *Parker v. State of California*, Case No. 10CECG 02116, filed November 29, 2017 ["Order After Hearing"].) They are relevant because they show that the trial court performed its own research and reached a conclusion that cannot be supported by logic or deductive reasoning. Read together, the trial court's orders both suggest that while no plaintiff gained anything financially from this litigation, the trial court is unwilling to award them fees unless each and every plaintiff can show that they have personally borne the cost of the litigation. As Appellants' Reply Brief states, this is a requirement that is not supported by law. (Reply Br. at p. 10.) These orders are highly probative of an intent to deny fees for reasons outside the normal course of a trial court's discretion. They are therefore extremely relevant to this appeal and should

be admitted. And, as such, portions of Appellants' Reply Brief relying on these orders are not improper.

The State further claims that submission of the National Rifle Association of America's (NRA) tax returns for the year 2015 are not relevant to this appeal because they were not before the trial court at the time of the appeal. These tax returns are still relevant even though they did not exist at the time of the judgment. This is because the trial court stated in its order after hearing, that "while the CRPA Foundation may have negligible corporate and business membership, the same cannot be said of the NRA." (Order After Hearing at p. 9.) In support of this claim, the trial court cited only a webpage showing how corporate entities may donate to the NRA and the various levels of recognition a corporate donor may receive based on how much money they donate. However, as Parker has pointed out, this is not evidence of any significant, *actual* corporate sponsorship, nor does this prove that the NRA is an organization dedicated to the business interests of its supporters. (Reply Br. at p. 9.) The existence of the webpage only shows how the amount of a *potential* corporate sponsor's donations translates into certain pre-determined titles like "Golden Ring of Freedom" or "George Washington." These titles have no independent significance by themselves, and are in fact, no different than the opportunity to buy "Gold Star" or "Business" memberships at membership-only warehouse stores or "Achievement Awards" used on fitness tracking devices.

To bolster his abuse of discretion argument, Parker submitted the most recent publicly available copy of the NRA's tax returns and requested that they be judicially noticed. (Appellants' Req. Jud. Ntc. at pp. 2, 6.) The purpose of this request was to show that the NRA's corporate support is negligible compared to the overall revenue from individual donations, and that by extension, the trial court's argument (and supporting citation) cannot support the conclusion that the NRA has significant corporate and business relationships that supersede its interest in protecting the rights of individal Americans to keep and bear arms.

The State's motion to strike does not address the merits of any of Parker's arguments, the content of the documents proffered, or the substance of the trial court's opinions. The State's only substantive comment is to baldly state that "the new documents could not have influenced the trial court's 2012 fee order . . . because the documents did not then exist." (Opp'n to Appellants' Req. Jud. Ntc. at p. 3. See also Resp. Mot. to Strike Reply Br. at p. 3.) Concededly, the proffered documents did not exist at the time of the trial court's 2012 fee order. But that fact is immaterial here because this Court has the authority to review extra-record material that is judicially noticeable. (*Lockley v. Law Office of Cantrell, Green* (2001) 91 Cal.App.4th 875, 881; *Smith v. Selma Community Hosp*. (2010) 188 Cal.App.4th 1, 45 ["Upon a party's request (or by the court on its own motion), *appellate courts have the same power as trial courts* to take judicial notice of a matter properly subject to judicial notice." [italics added]. See

also Types of Motions, Applications and Requests, Cal. Prac. Guide Civ. App. & Writs Ch. 5-B.) Further, this is not an argument for irrelevancy. Just because a document was not before the trial court when it denied fees in 2012 does not mean that it does not pass the minimum threshold of relevance. And, as described above, the documents Parker proffers easily meet that bar.

Finally, the State claims that when "[c]ounsel's briefing has unreasonably interfered with and disrupted the orderly process of [the] appeal, the appellate court . . . [may] strike the brief in its entirety with leave to file a new brief." (Mot. to Strike Reply Br. at 3., quoting *Brakke v. Economic Concepts, Inc.* (2013) Cal.App.4th 761, 765.) In recommending that Parker's entire Reply Brief be rejected, the State has very kindly described efforts to secure Parker's rights as "unreasonable interference" and "disorderly disruption." (*Ibid.*) This suggestion merits no answer. Parker's brief respectfully requests that the Court use its power to review the briefing and record, as well as judicially noticeable material, to find that Parker is entitled to a reasonable fee award, avoiding the need for remand. It has been Parker's hope that the arguments asserted in his briefing and the documentation submitted for judicial notice will only be of assistance to the Court in resolving a case which has gone on since 2012, and will likely generate further appeals if the case is remanded. As Parker's Reply Brief establishes, this Court has already heard the State's appeal on the merits, the State's appeal regarding Parker's entitlement to certain costs, and now Parker's

appeal regarding attorney's fees for trial work. (Reply Br. at pp. 7-11.) Should this Court remand, it is very likely that based on the trial court's (continued) reluctance to grant Parker the full amount of fees to which he is entitled, the Court will very likely see this case again. An exercise of the Court's power here could, as Parker's has argued, avert further appeals, and preserve judicial economy. Far from disrupting this case, Parker has attempted nothing more than to streamline it. Accordingly, there are no grounds for striking the entirety of Parker's reply.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that Respondent's Motion to Strike Appellants' Reply Brief should be denied.[1]

Date: January 19, 2018

Respectfully Submitted,

Michel & Associates, P.C.

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

[1] Parker notes that the State's submitted Proposed Order granting its motion to strike includes a typographical error. As written, the proposed order reads that "Respondents' motion to strike Appellants' opening brief is granted." As the State has not moved this Court to strike Parker's opening brief, the proposal should likely read "Respondents' motion to strike Appellants' reply brief is granted."

[PROPOSED] ORDER

This Court, having considered all the written arguments, HEREBY ORDERS that Respondent's Motion to Strike Appellants' Reply Brief is DENIED.

Dated: _____

_____
Presiding Judge

PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: Parker, et al. v. The State of California, et al. Court of Appeal Case Number: F064510 Superior Court Case Number: 10-CECG-02116	

1. At the time of service I was at least 18 years of age.
2. a. My ☐ residence ☒ business address is *(specify)*:

   180 East Ocean Boulevard, Suite 200, Long Beach, CA 90802

   b. My electronic service address is *(specify)*:
   lpalmerin@michellawyers.com
3. I electronically served the following documents *(exact titles)*:

   Appellants' Opposition to Respondents' Motion to Strike Reply Brief

4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: George Waters
   On behalf of *(name or names of parties represented, if person served is an attorney)*:

   State of California, Xavier Becerra, and California Department of Justice

   b. Electronic service address of person served: george.waters@doj.ca.gov
   c. On *(date)*: January 19, 2018

   ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: January 19, 2018

Laura Palmerin
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Court of Appeal)

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

PROOF OF SERVICE (Court of Appeal)

[X] **Mail** [ ] **Personal Service**

Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form. Do not use this form for proof of electronic service. See form APP-009E.

Case Name: Parker, et al. v. The State of California, et al.

Court of Appeal Case Number: F064510

Superior Court Case Number: 10-CECG-02116

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My [ ] residence [X] business address is *(specify)*:

   180 East Ocean Boulevard, Suite 200, Long Beach, CA 90802

3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b):*

   Appellants' Opposition to Respondents' Motion to Strike Reply Brief

   a. [X] **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

         (a) [ ] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

         (b) [X] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

      (2) Date mailed: January 19, 2018

      (3) The envelope was or envelopes were addressed as follows:

         (a) Person served:

            (i) Name: Hon. Jeffrey Y. Hamilton, Jr., Superior Court of California, County of Fresno

            (ii) Address: 1130 O Street
            Dept. 402
            Fresno, CA 93721

         (b) Person served:

            (i) Name:

            (ii) Address:

         (c) Person served:

            (i) Name:

            (ii) Address:

         [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

      (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state):

Case Name:	Court of Appeal Case Number:
Parker, et al. v. The State of California, et al.	F064510
	Superior Court Case Number: 10-CECG-02116

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: January 19, 2018

Laura Palmerin
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)