Order After Hearing

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

Hearing Date: February 8, 2018 (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 $139,860.20. The individual plaintiffs shall recover nothing.

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 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

[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.)

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.

In *Serano III*, plaintiffs incurred no obligation for their legal fees which were provided without charge by Public Advocates, Inc. and the Western Center on Law and Poverty, organizations receiving public or tax-exempt charitable funding. In a

footnote in *Serrano III*, the California Supreme Court stated, "While as we have indicated the fact of public or foundational support should not have any relevance to the question of eligibility for an award, we believe that it may properly be considered in determining the size of the award." (*Serrano III, supra*, 20 Cal.3d at p. 49, fn. 24.)

Accordingly, it is appropriate for the CRPA Foundation to recover its reasonable attorney's fees.

Calculating the Fees

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 48.) Here, defendant seeks a lodestar of $196,107.50 for the work done on the appeal and $41,570.00 for the work done on the attorney's fee motion through March of 2017.

As our Supreme Court has repeatedly made clear, the lodestar consists of "the number of hours *reasonably expended* multiplied by the *reasonable* hourly rate. . . ." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, italics added; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.) The California Supreme Court has noted that anchoring the calculation of attorney fees to the lodestar adjustment method "'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " (*Serrano III, supra*, 20 Cal.3d at p. 48, fn. 23.)

1. Number of Hours Reasonably Expended

While the fee awards should be fully compensatory, the trial court's role is not to simply rubber stamp the defendant's request. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1133; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361.) Rather, the court must ascertain whether the amount sought is reasonable. (*Robertson v. Rodriguez, supra*, 36 Cal.App.4th at p. 361.) However, while an attorney fee award should ordinarily include compensation for all hours reasonably spent, inefficient or duplicative efforts will not be compensated. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The constitutional requirement of just compensation, "cannot be interpreted as giving the [prevailing party] carte blanche authority to 'run up the bill.' " (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 880.) The person seeking an award of attorney's fees "is not necessarily entitled to compensation for the value of attorney services according to [his] own notion or to the full extent claimed by [him]. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.)

Clerical Tasks

"[P]urely clerical or secretarial tasks should not be billed ..., regardless of who performs them." (*Missouri v. Jenkins* (1989) 491 U.S. 274, 288.) Although counsel's declarations assert that clerical time has not been billed, review of the timesheet billing

details reveals billing for clerical tasks. Examples include, but are not limited to: timekeeper Nunez' printing out the stipulation for timekeeper Monfort to sign on 7/20/11; timekeeper Nunez' printing out, scanning, saving, emailing and filing stipulations on 9/8/11; timekeeper Nunez' revision "multiple times" of the respondent's brief on 8/13/12 in the context of not having worked on the case in two months, and in context of multiple attorney timekeepers revisions that same day are probably clerical in nature; timekeeper Barvir's finalizing, printing, preparing, and routing the brief to "CA" for formatting, tables and filing on 8/15/12; timekeeper Nunez' working on Table of Contents and Table of Authorities for Respondents' Brief on 8/15/12; timekeeper Nunez' finalizing, and preparing court filing and service copies of the brief and multiple revisions of the brief on 8/16/12, the day the brief was filed; timekeeper Nunez' receiving, reviewing, analyzing, scanning and forwarding the Stipulation on 8/29/12; timekeeper Nunez' "research re:" locating, saving and gathering documents for oral argument hearing binders; timekeeper Nunez' preparation of the oral argument binders, including location of documents, preparation of an index, and document copying on 7/5/13; timekeeper Nunez' addition of materials to the oral argument binders on 7/8/13; timekeeper Nunez' pulling documents, sorting, organizing, indexing, copying, revising, finalizing the oral argument binders on 7/9/13; timekeeper Nunez' receiving, reviewing, analyzing the link to the court of appeal opinion, downloading, printing, saving, and forwarding the link to all plaintiffs on 11/6/13; timekeeper Barvir's research the file to "pull all declarations filed in support of trial fee motion and route to CBM for review and use in preparing plaintiff declarations" on 2/23/17. The court makes a deduction of $4,174.80 for clerical time.

Excessive time

Every case deserves to be well-staffed and well-litigated and the court begrudges no firm a "team concept" approach, but exceptional time was billed to this case. Some examples illustrate where the use of multiple layers of staffing made simple tasks excessive.

1. *Fourth Stipulation to Extend Time for Appellant's Opening Brief*

What should have taken one attorney less than half an hour to communicate with opposing counsel, review and sign a stipulation, and send it back, took four timekeepers 1.4 hours over two days, December 8-9, 2011,for a total cost of $410.00.

2. *First Stipulation to Extend Time for Respondent's Brief*

Preparing, transmitting and filing the first stipulation for the extension of time to file the respondent's brief took four timekeepers approximately 3.9 hours of meetings, emails, drafting, revisions, and telephone calls, for and approximate total cost of $745.00. Again, the cost of a stipulation to extend time to file a brief is expected to be less than half an hour by one timekeeper.

3. *Second Stipulation to Extend Time for Respondent's Brief and Fee Appeal*

Preparing, transmitting and filing this stipulation for the extension of time to file the respondent's brief took three timekeepers 11.7 hours of drafting, revisions, meetings, and emails, for a total approximate cost of $2,637.50. To the extent this cost was increased by the component of the stay of the attorney's fee appeal, that cost is not recoverable in this, the merits litigation.

Time Reduction by Litigation Phase:

Counsel groups their time in five categories. The Court will follow that structure.

1. Case Management and Litigation Strategy

Plaintiffs' counsel spent "at least 75.6 hours" engaged in case management activities throughout the course of the appeal. These efforts included: (1) meeting to discuss case strategies and arguments on appeal, deadlines, and division of tasks; (2) preparing motions affecting the briefing schedule; (3) managing the various requests for amicus participation; and (4) reviewing party and amicus briefs. (Monfort Decl. ¶ 23.) Much duplicated effort and excessive time occurred in the first two categories.

Specifically, the Court cuts all of Barvir's time in this phase. Barvir spent approximately 17.1 hours engaged in case management and strategy work, whereas Monfort spent 34.2 hours. Barvir's time was spent as follows: 11.9 hours researching, drafting, reviewing, and revising documents impacting the briefing schedule; 1.2 hours communicating via e-mail with co-counsel and opposing counsel regarding stipulations and amicus curiae participation; 2.6 hours conducting legal research and drafting legal memoranda regarding the issues on appeal; 1.4 hours participating in meetings with co-counsel to discuss litigation status and strategies, the impact of pending legislation on the appeal, deadlines, case deadlines, and review of the State's reply brief. (Monfort Decl. ¶ 27.)

The time spent drafting documents relating to the briefing schedule is inflated, and covered by allowing Monfort's and Michel's time. Time spent in meetings and emails is covered by the allowing the time of the highest billing timekeeper. In all, the Court deducts $3,847.50 for this timekeeper in this phase.

The Court also cuts all of Nunez' time for this phase. She spent 9.3 hours, mainly on the parties' various stipulations to extend the briefing schedule and working with the court and the attorneys on this case regarding various case-related deadlines and party filings impacting the appellate briefing schedule. (Monfort Decl. ¶ 29.) As set forth above, these tasks were inflated. The true value of the tasks is captured by allowing Monfort's and Michel's time. As such, the Court deducts $1,162.50.

Finally, the Court deducts all 9.9 hours for the law clerks' time during this phase. None of the research done flagged as management or strategy either merited billing or was not eventually duplicated by an attorney. As such, the Court deducts $1,237.50.

2. *Joint Appendix*

Both Barvir and Nunez billed for "preparation," "review," "cross-referencing," and "analysis" of the joint appendix, essentially page by page review to ensure that the Attorney General's Office had correctly prepared the joint appendix. This task took these two timekeepers 27 hours. The court cannot determine if the work was done in tandem or in duplication. If in tandem, it is the sort of work best done by a paralegal, not an attorney.

Also, the Court feels that 2.5 hours of legal research regarding respondents' designation of record on appeal is excessive. Counsel is presumed to be competent at the tasks billed, and not to bill to become competent at the tasks undertaken. Training time is not compensable.

Finally, the court deducts 1.5 hours each from Barvir and Nunez for internal communication. This time is adequately captured by higher level timekeepers.

As such the court deducts $3,337.50 for this phase of litigation.

3. *Respondents' Brief*

Over 422.9 hours were billed to the creation of the 61 page Respondents' Brief.[2] This is particularly impressive when one considers that, according to the prior fee motion, Monfort and Barvir, then a law clerk, spent 186 hours reviewing and analyzing the legal and factual issues regarding the preliminary injunction and researching and drafting the memorandum of points and authorities in support of the request for preliminary injunction. Likewise the fee request should be viewed in light of the time spent on the summary judgment motion. Monfort and Barvir alone spent 112.2 hours drafting the memorandum of points and authorities in support of the motion for summary judgment, 49.7 hours preparing the memorandum of points and authorities in support of the reply, 92.4 hours in additional legal research, and 55.5 hours reviewing and revising the summary judgment documents. In the court's review of the billing records it saw no evidence of economies of scale or institutional knowledge. Six timekeepers billed on the project: three attorneys, two law clerks and one paralegal.

The Court is well aware that "[a]ppellate work is most assuredly not the recycling of trial level points and authorities. Of course, the orientation of trial work and appellate work is obviously different [citation], but that is only the beginning of the differences that come immediately to mind. [¶] For better or worse, appellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney's 'work product' more closely. They will also have more staff (there are fewer research attorneys per

[2] Plaintiffs refer to the brief as having 76 pages, but in reading the brief, the table of contends only refers to 61 substantive pages, presumably the remaining 14 pages are tables of contents and authorities and the like.

judge at the trial level) to help them identify errors in counsel's reasoning, misstatements of law and miscitations of authority, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention." (*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 408–409.)

As the *Shaban* court further explains: "[t]hen there is the simple matter of page limitations. Appellate courts are more liberal than trial courts as to the number of pages counsel are allowed. [Citations.] Granted, the extra length of the 'briefs' in appellate and reviewing courts is not always a good thing [citations], but the difference does mean that appellate counsel will have much more freedom to explore the contours and implications of the respective legal positions of the parties. Part of that exploration may mean additional research that trial counsel simply will not have had the time to do. [¶] Finally, because the orientation in appellate courts is on whether the trial court committed prejudicial error of law, the appellate practitioner is on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities." (*Shaban, supra*, 88 Cal.App.4th at p. 409.)

"The upshot of these considerations is that appellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product. Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value." (*Shaban, supra*, 88 Cal.App.4th at p. 410, fn. omitted.)

The question facing this Court is how much time should be billed by how many timekeepers. This Court has substantial experience in evaluating fee motions for appellate work. For example, this court was the trial court in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association*, Fresno Superior Court Case No. 08CECG01416, a matter which was litigated through two motions for summary judgment, and resulted appeals, oral arguments and published decisions from both the Fifth District Court of Appeal and the California Supreme Court. The total amount of fees claimed for all appellate work by respondents in that case is less than the fees claimed as the appellate lodestar for this case.

The standard of review on appeal of a motion for summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Counsel for plaintiff is correct that the precise California standard of review for a vagueness challenge is open to some debate, so a respondent's brief on appeal from the grant of such a motion is a substantial amount of work.[3] The question is how much time is reasonable.

The Court starts by examining the 117.2 hours spent by the law clerks. Of that time, 78.3 hours was spent conducting legal research, analyzing, synthesizing, and drafting legal memoranda regarding case law involving the standards of review for,

[3] The opening brief filed by appellants was approximately 20 pages long and the respondent's brief was approximately 61 pages in length.

and framework of, the void-for-vagueness doctrine, facial challenges, and as-applied challenges in state and federal courts. (Monfort Decl. ¶ 38.) This is excessive. Looking at the individual time entries, Barvir and Monfort also conducted this same legal research and read these same cases. Reasonable billing does not include wholesale duplication of effort or training time for law students. The 6.7 hours spent meeting with attorneys to discuss findings and the brief is likewise excessive and largely captured by allowing Monfort's and Barvir's time. The 32.2 hours reviewing and revising Respondents' Opening Brief's citations and fact sections for accuracy is likewise high. Barvir, who drafted the bulk of the brief, presumably could be relief on to do so accurately. It should not take nearly a week to fact check citations in a brief on what was primarily a legal question on appeal.

For those reasons, the Court deducts 86.7 hours of law clerk time from this stage of the litigation, for a total deduction of $10,837.50.

With respect Nunez, the court finds that much of her time spent on the respondent's brief appears to have been clerical in nature, and therefore does not address it further in this section.

Barvir spent 198.3 hours on the respondent's brief, 163.9 of which was spent drafting, reviewing, and revising respondents' brief and conducting legal research as "necessary." (Monfort Decl. ¶ 37.) Barvir was a junior attorney (2-3 years) at the time of the appeal, and had worked on the litigation since before her admission to the Bar, but no evidence is provided as to her background in appellate work at this time in her career. (Barvir Decl.) Judging by the number of hours spent by her and the more senior lawyers reviewing her work, there appears to have been a component of inexperience in her billings. The court deducts 100 hours from Barvir's research and drafting and 7 hours from Barvir's communication activity, for a total deduction of $24,075.00.

With respect to Monfort, the Court notes that he billed 15 hours for reviewing and analyzing the State's Opening Brief in the Management phase as well as the Respondents' Brief phase. Thirty hours is excessive for one attorney's review of a 21 page brief. The Court deducts 15 hours. The Court further deducts 15 hours from the task of drafting and researching the respondents' brief, for a total deduction from Monfort's time of $9,750.00.

4. Oral Argument

The 311.7 hours spent on preparing for, traveling to and conducting oral argument is impressive. This Court has observed entire appeals prosecuted in less time.

The Court finds the utility of the law clerks' work on oral argument dubious, particularly where, as here: 1) counsel prides themselves on their experience in this field; 2) briefing work done by the law clerks was ultimately redone and redrafted into other documents by attorneys Barvir and Monfort; 3) no law clerk has been shown to have any relevant experience at appellate oral argument. Accordingly, of the 73.4 billed by the law clerks, 25.4 will be allowed, for a total deduction of $6,000.00.

With respect to the activities of Nunez on oral argument, the preparation of the oral argument binders seems to the Court to be mainly clerical and is dealt with in that section. The preparation of the Notice of Unavailability was unusually involved, for such a simple document and issue, and the court deducts 3 hours, for a total deduction of $375 for these efforts.

Barvir spent 71.5 hours during the oral argument phase, including 58.8 hours preparing Monfort for oral argument by conducting moot court rounds and producing study notebooks and binders that included relevant record excerpts, and charts on relevant case briefs, case holding summaries, and statutory authority. This is an impressive amount of time, especial where Monfort billed 67.0 hours on his own for "conducting legal research on scienter, analyzing all briefs and records, drafting outlines of arguments, and preparing various other documents for oral argument." The court concludes there was duplication of efforts with respect to Barvir's work and deducts 38 hours, for a total of $8,550.00.

Monfort's own time is not without criticisms. He has repeatedly billed for analyzing the briefs and record. The Court finds Monfort's time spent preparing for oral argument excessive and deducts 10 hours, for a total deduction of $3,250.00.

5. Post-Hearing Activity, Review of Decision, and Petition for Review

With respect to the post-hearing activity, only a few tasks stand out. Barvir's one hour spent drafting correspondence to opposing counsel regarding new timelines for fee appeal and proposed stipulation seeking further stay of fee appeal and stay of motion for attorneys' fees on appeal in light of State's Petition for Review of merits appeal is both excessive and related to the fee appeal. Her 2.1 hours drafting the Request for Extension to File Answer to Petition is excessive. Thus, 3.1 hours will be deducted, for a total reduction of $697.50.

With respect to Nunez, her 0.9 hours drafting and formatting Request for Extension of Time to File Answer to Petition for Review is excessive and will be disallowed. The total deduction is $112.50.

6. Motion for Attorney's Fees

This is not the first Motion for Attorney's Fees brought by this firm, or even by this firm in this litigation, yet 169.8 hours were billed to it. This is remarkable.

The pattern of multiple meeting and emails to discuss strategy, status, and delegation of tasks appears to have compounded the time necessary to complete the motion rather than to have shortened it.

The Court has substantial experience with attorney's fee motions and 1021.5 fee motions; it is unusual to see them cost over $41,000.00. The court has carefully reviewed the billings and deducts 80.6 hours from Barvir's time and 7 hours from Monfort's time, for a total deduction of $20,410.00.

2. Reasonable Hourly Compensation

Reasonable hourly compensation is the "hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type" (*Ketchum, supra,* 24 Cal.4th at p. 1133.) Ordinarily, "'the value of an attorney's time . . . is reflected in his normal billing rate.'" (*Mandel v. Lackner* (1979) 92 Cal. App. 3d 747, 761.)

The billing rates for plaintiffs' counsel are reasonable: $450 for C.D. Michel; $325 for Clinton B. Monfort; $250 for Sean A. Brady; $225 for Anna A. Barvir and $125 for the law clerks, as is the $125 rate per hour for the senior paralegal. These fees are also in line with the usual Fresno rates.

3. Multiplier

Plaintiffs seek a multiplier of 1.5 to apply to the lodestar for the appellate fees only.

A multiplier enhancement to the lodestar "is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class." (*Ketchum, supra,* 24 Cal.4th at p. 1138.) A multiplier may also be applied where the attorney has shown extraordinary skill, resulting in exceptional results. (*Ibid.*; *Graham, supra,* 34 Cal.4th at p. 582.) Courts are not obligated to apply a positive multiplier even where those factors are present, however. (*Ketchum, supra,* at p. 1138. ["Of course, the trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case"].) Indeed, courts have discretion even to apply a negative multiplier. (*Ibid.* ["To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward ..."]; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249 [fee award under section 1021.5 may be reduced where claimant achieves limited success].)

Courts have substantial discretion to select the factors they deem relevant to their multiplier analysis. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 40–41.) The *Serrano III* factors were specific to the facts of that case and are merely illustrative of what a court may consider when conducting a multiplier analysis. (*Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 834.)

Nonetheless, factors to consider include: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing lawsuits of the character here involved; (6) the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations

by which they are employed . . . ." (*Serrano III, supra,* 20 Cal.3d at p. 49, fn. omitted.) The California Supreme Court has emphasized, "that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar." (*Ketchum, supra,* 24 Cal. 4th at p. 1138.)

a. Novelty and Complexity of the Issues

In *Blum v. Stenson* (1984) 465 U.S. 886, the Supreme Court discussed what might be a basis for an upward adjustment to the lodestar. (*Blum, supra,* 465 U.S. at p. 886.) The Court noted that certain suggested bases for an upward adjustment were not warranted because they were already reflected in the lodestar. (*Id.* at p. 898.) Specifically, "[t]he novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates." (*Ibid.*) While this case presented a novel issue concerning a vagueness challenge under California law regarding the Second Amendment, counsel tout themselves as experts in this very field. The number of hours billed was considerable, and counsel was adequately compensated for the complexity of the case.

b. The Skill Displayed

In general, "special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." (*Blum, supra,* 465 U.S. at p. 889.) As our Supreme Court has observed, "[t]he factor of extraordinary skill, in particular, appears susceptible to improper double counting; ... a more skillful and experienced attorney will command a higher hourly rate. (*Ketchum, supra,* 24 Cal.4th at p. 1138-1139.) "Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable." (*Id.* at p. 1139.)

Here, the Court has read all of the pleadings filed in this case and the briefs filed in the appeal. The skill displayed by plaintiffs' counsel was good, but not extraordinary. Counsel's hourly rates are adequate compensation.

c. The Contingent Nature of the Case

This is the most important factor in awarding a multiplier. Our Supreme Court has explained: "[The multiplier] for contingent risk [brings] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum, supra,* 24 Cal.4th at p. 1138.) The court further noted that applying a fee enhancement does not inevitably result in a windfall to attorneys: "Under our precedents, the unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk ... The adjustment to the lodestar figure, *e.g.*, to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike

a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ibid*; see also *Horsford v. Board of Trustees, supra*, 132 Cal. App. 4th at pp. 399-400.)

This case was not taken on a contingency. Plaintiff's counsel was paid $285,000 on a retainer basis during the appeal.

d. Taxpayers Will Pay This Fee Award

This factor weighs against a multiplier but is certainly not dispositive. (See *Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1332 ["Allowing properly documented attorneys' fees to be cut simply because a losing party is a governmental entity would defeat the purpose of the private attorney general doctrine codified in Code of Civil Procedure section 1021.5 and would also incentivize governmental entities to negligently or deliberately run up a claimant's attorneys' fees, without any concern for consequences"].)

e. No Public Funding

This factor is not at issue.

f. Fees Will not Inure to the Public

Any attorney's fees will go directly to a private firm, not to a public interest organization. Thus, there is no public benefit from increasing the fees.

g. Results Obtained

Plaintiff contend that they obtained "a once-published opinion adopting, wholesale, their novel facial vagueness theory, detailing precisely why criminal laws that touch upon Second Amendment rights require the most exacting language. [Citation omitted.] While the opinion was automatically de-published on review by the Supreme Court, it remains good law and will undoubtedly set important precedent on this complex issue." Plaintiffs overstate their victory. The Court of Appeal decision is depublished and remains so. Plaintiff's motion to have the decision published was denied. The case has no precedential effect.

On balance, the Court finds no multiplier is warranted.

Accordingly, $118,700.20 is awarded for the appellate work and $21,160.00 for the work on the fee motion.

Issued By: _____ (Judge) **on** 4/4/18 (Date).