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7 Attorneys for Petitioner - Plaintiff
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 FRANKLIN ARMORY, INC., et al.,

12 Petitioners-Plaintiffs,

13 v.

14 CALIFORNIA DEPARTMENT OF JUSTICE,
15 et al.,

16 Respondents-Defendants.
17

Case No.: 20STCP01747

[Assigned for all purposes to the Honorable Daniel
S. Murphy; Department 32]

**PLAINTIFF’S REPLY TO THE STATE’S
OPPOSITION TO PLAINTIFFS’ MOTION
TO STRIKE COSTS OR, ALTERNATIVELY,
STAY ENFORCEMENT OF JUDGMENT
PENDING APPEAL**

Hearing Date: September 25, 2024

Hearing Time: 8:30 AM

Department: 32

Judge: Hon. Daniel S. Murphy

Reservation ID: 315248532217

Action Filed: May 27, 2020

1 The State’s primary argument is that this Court does not have discretion to deny its costs because
2 of precedent suggesting that a defendant against whom a plaintiff recovers *no relief* is a prevailing party.
3 (State’s Oppn. to Pls’ Mot. to Strike Costs (“State’s Oppn.”), pp. 1-2, citing *Huerta v. Kava Holdings,*
4 *Inc.* (2018) 29 Cal.App.5th 74, 79). But the State ignores the fact that the Plaintiffs did recover the relief
5 they requested when the “Other” option was finally added to the DES and only after the Plaintiffs filed
6 this action and prevailed against the State’s second demurer. Nowhere in its opposition does the State
7 deny that this lawsuit was the catalyst for its move to add an “Other” option. That is decisive.

8 The Supreme Court of California has explained that “‘prevailing party’ and ‘successful party’ are
9 synonymous terms, *and neither...require that the successful or prevailing party obtain a court*
10 *judgment.*” (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 610, italics added) That
11 is precisely what happened here. While Plaintiffs did not succeed on their remaining claims with the trial
12 court,¹ they were a successful party in that this lawsuit was the reason the State ultimately acquiesced to
13 the primary demand that drove Plaintiffs to bring this lawsuit in the first place.

14 The State also argues that because the court ruled against Plaintiffs on summary judgment and
15 found the operation of the DES to be discretionary, Plaintiffs cannot be a prevailing party. (State’s
16 Oppn., p. 3.) But the Supreme Court has rejected this argument as well: “If, as is clearly the case, a
17 defendant can be a prevailing or successful party after a plaintiff has voluntarily dismissed the case
18 against it, it is difficult to fathom why a plaintiff cannot be considered a prevailing or successful party
19 when it achieves its litigation objectives by means of defendant’s ‘voluntary’ change in conduct in
20 response to the litigation.” (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, *as modified* (Jan.
21 12, 2005)). In fact, that is precisely why California recognizes the catalyst theory for determining
22 “prevailing party” status.

23 What’s more, “there may not always be a prevailing party,” and while a defendant in whose
24 favor a dismissal is entered is typically a prevailing party and entitled to costs as a matter of right, the
25 catalyst theory is an exception to this rule. (*City of San Clemente v. Dept. of Transp.* (2023) 92
26 Cal.App.5th 1131, 1152, *reh’g denied* (July 24, 2023)). In *City of San Clemente*, the court ultimately

28 ¹ Plaintiffs filed a notice of appeal on September 9, 2024. (Pls.’ Ntc. of Appeal (Sept. 9, 2024),

1 decided to award costs to the defendant, but only *after* concluding the “litigation was *not* the catalyst of
2 the Corridor Agency’s change in plans.” (*Ibid.*) Only after that did the court decide “that the exception
3 did *not* apply, and the Corridor Agency and the Environmental Parties were prevailing parties because
4 they were defendants in whose favor a dismissal had been entered.” (*Ibid.*) If the State’s opposition had
5 laid out a convincing case—or any case—for why this litigation was *not* the catalyst for the State’s
6 “voluntary” addition of the “Other” option to the DES, then perhaps it too would have been entitled to
7 its costs like the defendants in *City of San Clemente*. But the State did not even attempt to do so, so
8 Plaintiffs’ motion must be granted.

9 The vast remainder of the State’s opposition reads somewhat like a defense to a fee motion. But
10 Plaintiffs did not file a fee motion, they filed a motion to strike costs. The points regarding catalyst
11 theory were simply raised to show that Plaintiffs are the prevailing party in this action for purposes of
12 determining which party, if any, is entitled to litigation *costs* at this time. To be sure, the State makes a
13 number of arguments for why it thinks a *fee motion* by Plaintiffs should fail. (Oppn., pp. 2-4.) And
14 perhaps the parties will have to litigate that issue in the future. But even if Plaintiffs are ultimately not
15 entitled to section 1021.5 attorney’s fees because, for instance, this Court agrees with the State that
16 Plaintiffs were motivated by their own pecuniary interest, that would not mean they are not a successful
17 or prevailing party. It would just mean they are not entitled to attorney’s fees despite their success
18 because they failed to meet other elements of section 1021.5. Proving pecuniary interest (or lack thereof)
19 has no part in the cost analysis. So even if Plaintiffs did have a pecuniary interest, that would not bar
20 them from being considered the “prevailing party” for purposes of opposing the State’s cost demand.

21 Finally, the State argues that Plaintiffs’ alternate request for relief, seeking a stay of the
22 enforcement of judgment pending appeal, is unnecessary because there is an automatic stay in place in
23 light of Plaintiffs’ recently filed appeal. (State’s Oppn., p. 5, citing *Bank of San Pedro v. Superior Court*
24 (1992) 3 Cal.4th 797, 801.) Plaintiffs do not object to this Court withholding a ruling on this motion
25 until after the appeal has concluded. As discussed in Plaintiffs’ opening brief, they had asked the State to
26 stipulate to stay post-litigation of costs and fees until after their appeal had been decided to preserve
27

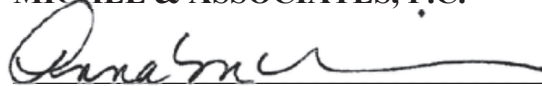
28 Dkt. No. 136.)

1 resources. For unexplained reasons, the State refused this request, necessitating this premature briefing
2 on an issue that may be moot should Plaintiffs prevail on appeal.

3 For these reasons, and those set forth in Plaintiffs’ moving papers, this Court should strike the
4 State’s costs memorandum in its entirety. Alternatively, the Court may hold this motion in abeyance till
5 after the appeal is decided.²

6
7 Date: September 18, 2024

MICHEL & ASSOCIATES, P.C.



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9 Anna M. Barvir
Attorneys for Petitioner-Plaintiff

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24 ² While a minor point at this juncture, the State also argues that “Plaintiff also incorrectly asserts
25 that judgment was prematurely entered citing the 14-day rule under California Rule of Court 3.1590.
26 This rule applies to bench trials, not summary judgment motions.” (State’s Oppn., p. 2, n. 1, citing
27 *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982.) But *Thompson* concerned the 15 days of Rule
28 3.1590(g), which pertains to objections to proposed statements of decision. What Plaintiffs cited in their
opening brief was Rule 3.1590(j), which states that: “Any party may, within 10 days after service of the
proposed judgment, serve and file objections thereto.” Rule 3.1590(j) is not limited to bench trials. The
State is looking at the wrong subsection.

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA
3 COUNTY OF LOS ANGELES

4 I, Claudia Nunez, am employed in the City of Long Beach, Los Angeles County, California. I am
5 over the age eighteen (18) years and am not a party to the within action. My business address is 180
6 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

7 On September 18, 2024, I served the foregoing document(s) described as

8 **PLAINTIFF’S REPLY TO THE STATE’S OPPOSITION TO PLAINTIFFS’
9 MOTION TO STRIKE COSTS OR, ALTERNATIVELY, STAY ENFORCEMENT
10 OF JUDGMENT PENDING APPEAL**

11 on the interested parties in this action by placing
12 [] the original
13 [X] a true and correct copy
14 thereof by the following means, addressed as follows:

15 Kenneth G. Lake
16 Deputy Attorney General
17 Email: Kenneth.Lake@doj.ca.gov
18 Andrew Adams
19 Email: Andrew.Adams@doj.ca.gov
20 California Department of Justice
21 300 South Spring Street, Suite 1702
22 Los Angeles, CA 90013
23 *Attorney for Respondents-Defendants*

24 X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic
25 transmission through One Legal. Said transmission was reported and completed without error.

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

28 Executed on September 18, 2024, at Long Beach, California.

Claudia Nunez

Claudia Nunez

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Branch Name: Stanley Mosk Courthouse
Mailing Address: 111 North Hill Street
City, State and Zip Code: Los Angeles CA 90012

SHORT TITLE: FRANKLIN ARMORY, INC., et al. vs CALIFORNIA DEPARTMENT OF JUSTICE, et al.

CASE NUMBER:
20STCP01747

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