SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 09/07/2018 TIME: 01:30:00 PM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Kelly Breckenridge
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT: O. Godoy

CASE NO: **37-2016-00028494-CU-MC-CTL** CASE INIT.DATE: 08/17/2016
CASE TITLE: **Spotlight On Coastal Corruption vs Kinsey [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

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EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: Martha McClure, Wendy Mitchell, Erik Howell, Mark Vargas, Steve Kinsey
CAUSAL DOCUMENT/DATE FILED: Motion for Attorney Fees, 07/26/2018

EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: Spotlight on Coastal Corruption
CAUSAL DOCUMENT/DATE FILED: Motion for Attorney Fees, 07/24/2018

EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: Martha McClure, Wendy Mitchell, Erik Howell, Mark Vargas, Steve Kinsey
CAUSAL DOCUMENT/DATE FILED: Motion - Other Motion to Tax Costs, 07/06/2018

APPEARANCES
Cory J Briggs, counsel, present for Plaintiff(s).
Joel S Jacobs, counsel, present for Defendant(s).

The Court hears argument by counsel on the Motions for Attorneys' Fees and to Tax Costs.

The Court takes this matter under submission.

The Court, having taken the above-entitled matter under submission on this date and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Rulings on Motions for Attorneys' Fees/Tax Costs

Spotlight on Coastal Corruption v. Kinsey, Case No. 2016-28494

September 7, 2018, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

This action is principally one for recovery of civil fines under the Public Resources Code. Plaintiff alleges that the defendants – all of whom are or were appointed members of the California Coastal Commission – violated several statutory proscriptions on "*ex parte* communications." The application of these statutory provisions has never before been litigated.

The complaint was filed August 17, 2016. It sought civil fines against the defendant commissioners based on a "per violation" imposition, as follows:

Former Commissioner Kinsey: $5,250,000.00
Commissioner Howell: $3,600,000.00
Former Commissioner McClure: $3,150,000.00
Former Commissioner Mitchell: $4,500,000.00
Commissioner Vargas: $5,625,000.00

Defendants demurred to the complaint, urging lack of standing, failure to allege specific facts suggesting a knowing violation of the "*ex parte*" rules, and uncertainty. ROA 15-16. Defendants also scheduled a motion to strike, but did not file one. ROA 13, 14.

Plaintiff filed, on November 28, 2016, a document entitled "Notice of Plaintiff's Intent to File First Amended Complaint." ROA 17. While this might have been satisfactory prior to January 1, 2016, the Legislature amended Code of Civil Procedure section 472 such that it now requires the amended complaint to be "filed and served no later than the date for filing an opposition to the demurrer." So on December 9, 2016, the court sustained the demurrer with 10 days leave to amend. ROA 22, 27. The first amended complaint (FAC) followed within days. ROA 23. By now it was entitled, in addition to an amended complaint, a petition for a writ of mandate. The relief sought was consistent with the new nomenclature: several species of declaratory relief; an order that the fines be paid to the Coastal Commission; injunctive relief; mandamus relief; and fees and expenses under Code of Civil Procedure section 1021.5.

Defendants demurred again. ROA 28. They again asserted lack of standing. They also asserted that the plaintiff failed to exhaust administrative remedies, and that the FAC "fails to allege specific facts supporting a knowing violation of the *Ex Parte* Rules." On February 17, 2017, after full briefing and hearing, the court sustained the demurrer with leave to amend. ROA 49. The court found plaintiff had adequately alleged standing, but that there were shortcomings in the allegations regarding knowing violations of the "*ex parte*" rules. *Id.* The second amended complaint (SAC) was filed a few weeks later. ROA 52.

Defendants demurred again, and filed a motion to strike. The demurrer urged two grounds: failure to exhaust and failure to allege specific facts supporting knowing violations of the *ex parte* rules. ROA 57. The motion to strike attacked standing and sought the striking of references to "statutory penalties other than Public Resources Code section 30820(b)." ROA 56. Following full briefing and a hearing on May 19, 2017, the court overruled the demurrer in part and sustained it in part. ROA 65. Although not initially inclined to do so, the court granted leave to amend. *Ibid*. The third amended complaint (TAC) was filed on June 6, 2017. ROA 66. It pled a multi-count single cause of action for violation of laws governing *ex parte* disclosures. It alleged defendants committed well over 100 violations of the Public

Resources Code *ex parte* disclosure rules. TAC, paragraphs 17-19. The relief sought in the TAC was similar to that sought in the SAC. Defendants answered. ROA 67. Less than a month later, defendants filed their motion for summary judgment/adjudication on the TAC. ROA 68-73, 102.

The case had been set for trial in early December, 2017. ROA 48-51. However, the plaintiff approached the court in September 2017 via *ex parte* application seeking more time to oppose the motion for summary judgment/adjudication. ROA 78. The court granted the *ex parte* application, and continued the trial to February, 2018, to facilitate opposition briefing and a hearing on the motion for summary judgment/adjudication. ROA 86-90.

Discovery disputes thereafter arose, but were resolved without court intervention. ROA 91-100; 104-113.

Following full briefing (ROA 102, 114-125) and a hearing on January 19, 2018, the court denied the motion for summary judgment in a detailed ruling. ROA 130. The court found triable issues of fact. In addition, with regard to defendants' argument regarding "substantial compliance" with the *ex parte* disclosure rules, the court opted for full factual development at trial (so that the reviewing court may have the benefit of a more complete record in determining the several novel issues presented by this case). *Ibid.* The court also noted the signal purpose of the Coastal Commission *ex parte* rules: to banish forever the days of the smoke-filled room, where deals are cut and policies determined without meaningful input or participation or even notice to the public. *See Dept. of ABC v. Appeals Board* (2006) 40 Cal.4th 1, 5] The court held this obvious legislative purpose would be undercut if Commissioners could be summarily exonerated from violations of the rules based simply on their written declarations, without the opportunity for cross-examination or a determination regarding demeanor and credibility. ROA 130.

Plaintiff thereafter filed, by stipulation, the 4th Amended Complaint. ROA 132, 136. It added two counts alleging that defendants McClure and Mitchell violated Public Resources Code section 30327.5(b) "by accepting illegal gifts." The parties answered ready at the TRC. ROA 133-135. They also answered ready at the trial call on February 23, and the trial was confirmed to start the following Tuesday (as the court was then finishing another trial).

Each side filed a single motion *in limine*, and both were opposed. ROA 139-147. The court reviewed same over the ensuing weekend, and faxed tentative rulings to the parties on February 26. These were argued and ruled upon on February 27, following which the court heard opening statements and evidence began.

Ultimately, the court heard from 13 witnesses over 6 days (some more than once), and received around 800 exhibits into evidence (the majority by stipulation). Following phase 1 argument on March 7, 2018, the court took that part of the case under submission.

After the parties jointly requested post-evidence briefing in lieu of closing argument, the court outlined for the parties a phased approach to the court's rendering of a decision, to include an initial tentative decision on four gateway issues, followed by further briefing, followed by a further tentative decision. The parties agreed to this approach. On March 9, the court published its tentative decision on the phase 1 issues in accordance with Code of Civil Procedure section 632 and CRC 3.1590. The defendants filed, on March 23, an "objection" to the initial tentative decision, ROA 175, which the court interpreted as a request for SOD (RFSOD) under CRC 3.1590(d). The court assumes this is what the defendants were trying to accomplish with their March 23 filing (as the Rules of Court do not contemplate an "objection" to

a tentative decision).

In conformance with the parties' stipulation and the court's April 26 order (ROA 201), phase 2 briefing was filed on April 6, April 20, and May 4, 2018. ROA 191-192, 198, 204. The briefing was extensive: plaintiff's briefing totals 19 pages of narrative plus two detailed spreadsheets/ tables plus several inches of backup. Defendants' "brief" was 70 pages. In addition, defendants filed a series of objections regarding the Kaufman/Kaufmann issue (ROA 193-197). The court reviewed the briefs and the accompanying spreadsheets/tables, and on May 7 filed and served its tentative decision on phase 2 issues in accordance with CRC 3.1590. ROA 205. It stated it would become the Statement of Decision (SOD) unless the steps required under CRC 3.1590(d) were taken within the timeframe set forth therein.

Despite having been told explicitly in ROA 175 that CRC 3.1590 does not contemplate "objections" to tentative decisions, defendants filed another such "objection" on May 18, 2018. ROA 213-219. Although the court once again treated it as a RFSOD, there are several problems with doing so. First, the document (ROA 213) is bereft of an essential element called for by CRC 3.1590(d): a specification of the "principal controverted issues" to be addressed by the court. Second, the May 18 filing was both an effort to adduce new evidence not presented at the trial, and to re-argue points already addressed by the court. Neither is contemplated by CRC 3.1590. The court denied the request for judicial notice (ROA 214-215) and ignored the declaration of Louise Warren and the exhibits thereto (ROA 216-218). Defendants failed to associate these items with a trial exhibit number, and the court noted the time for the offering of evidence had passed.

The court filed and served its PSOD [CRC 3.1590(f)] for both phases of the trial on the morning of May 21, 2018. [Because the trial courts are not final, it is important that they be prompt, and the court has at every turn tried to carry out this obligation.] Later the same day, plaintiff filed its RFSOD. ROA 222.

The court filed and served its Amended PSOD on May 24, 2018. ROA 223. Plaintiff filed a notice of non-objection the following day. ROA 226. Plaintiff also lodged two alternative proposed versions of the judgment. ROA 230. Defendants filed no further objections to the PSOD within the timeframe contemplated by CRC 3.1590(g). The court used neither version of the judgment prepared by plaintiff, and instead prepared its own version. It was filed contemporaneously with the SOD on June 12, 2018. ROA 231-238. Notice of entry of the judgment was thereafter given. ROA 239. Both sides stated on Sept. 7 they have filed notices of appeal.

In the SOD, the court held:

"For purposes of an award of costs, the court is of the view that the law could not be clearer.
The right to recover costs is based entirely on statute. In the absence of an authorizing statute, neither party is entitled to costs. *Garcia v. Hyster Co*. (1994) 28 Cal.App.4th 724, 732. One such statute is Code of Civil Procedure section 1032(b), which provides that a *prevailing party* is entitled to recover costs *as a matter of right* in any action or proceeding. *See Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 800. Section 1032(b)(4) defines "prevailing party" as "the party with the net monetary recovery." Under any measure, this is plaintiff. Although former Commissioner McClure is the prevailing party on count 4 and former Commissioner Mitchell is the prevailing party on count 5, plaintiff is the prevailing party on counts 1, 2 and 3 as to all five defendants, and has the "net monetary recovery" as to all 5 defendants. Plaintiff is entitled to file a memorandum of costs."

Plaintiff filed a memorandum of costs seeking $31,322.66. ROA 240. The single largest line item is for deposition costs: $21,260.33. ROA 240. Defendants have filed a motion to tax costs,* challenging

several line items on several grounds. ROA 242-243. Plaintiff filed opposition, conceding one item and opposing the motion on other grounds. ROA 296. Defendants filed reply. ROA 299. The court has reviewed these submissions.

Plaintiff filed a motion for attorneys' fees, seeking "$532,615.95, plus an upward adjustment by a multiplier not to exceed 1.5 as determined by the Court to be appropriate, along with related filing fees in the amount of $89.85." ROA 244-246. In other words, plaintiff sought over $1.3 million. The motion is made under Public Resources Code sections 30824 and 30327(b) and Code of Civil Procedure section 1021.5.

Defendants filed their own motion for attorneys' fees, seeking $649,353.18. ROA 247-258, 298. Boiled down to its essence, the factual basis for the defendants' motion is encapsulated in the following table:

Defendant	**Total Penalties Sought**	**Total Penalties Awarded**	**Defendant's Monetary Success**
Kinsey	$5,250,000.00	$30,300.00	99.42%
Howell	$3,600,000.00	$3,500.00	99.9%
Vargas	$5,625,000.00	$13,600.00	99.76%
McClure	$3,150,000.00	$2,600.00	99.92%
Mitchell	$4,500,000.00	$7,100.00	99.84%

ROA 254. The legal basis is defendants' assertion that they, not plaintiff, were the prevailing parties in the litigation.

Both sides filed opposition to the other's motion. ROA 289-295, 297. Both sides filed reply. ROA 299-302. The court has reviewed these papers. The motions were initially set for August 17, then continued to August 24 and then to today via stipulation and then *ex parte* application. ROA 276, 288. The court published a tentative ruling on Sept. 6, and heard oral extensive argument on Sept. 7. As has been true throughout the case, the argument by both counsel was thoughtful and well prepared. The court took the motions under submission, and now decides the submitted matters.

2. <u>Applicable Standards</u>.

A. California follows the "American rule," under which each party to a lawsuit ordinarily must pay his, her or its own attorney fees. *Trope v. Katz* (1995) 11 Cal.4th 274, 278; *Gray v. Don Miller & Associates, Inc*. (1984) 35 Cal.3d 498, 504. Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation is left to the agreement of the parties "[e]xcept as attorney's fees are specifically provided for by statute." Public Resources Code sections 30824 and 30327(b) are two such statutes; Code of Civil Procedure section 1021.5 is another. The latter speaks in terms of a "successful party;" the former say "prevailing party." The two are synonymous. *Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 570. The determination of "prevailing party" for an award of costs does not determine who is the "prevailing party" for purposes of a statutory award of attorneys' fees. *MacQuiddy v. Mercedes Benz USA* (2015) 233 Cal.App.4th 1036, 1047; *Salehi v. Surfside III HOA* (2011) 200 Cal.App.4th 1146, 1153. When a statute does not define "prevailing party" for the purpose of awarding attorney's fees, the determination is a practical one, focusing on a comparison between what the plaintiff sought to accomplish, and what it did accomplish. *Galan v. Wolfriver Holding Corp*. (2000) 80 Cal.App,4th 1124, 1128; *Salehi v. Surfside III HOA, supra,* 200 Cal.App.4th at 1153; *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal,App.4th 1568, 1574 ("declin(ing) to adopt a rigid

interpretation of the term 'prevailing party' and, instead, analyz(ing) which party had prevailed on a practical level.'")

B. The indiscriminate use of the phrase "cause of action" to mean "count" is discussed in section 25 of the Witkin treatise on Pleading (Cal. Procedure, 4th Ed. at p. 87). It is also discussed at pp. 394-395 of the Supreme Court's opinion in *Baral v. Schnitt* (2016) 1 Cal.5th 376. "California has consistently applied the primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action." *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795. "[The primary right theory] provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." *McKee v. Doud* (1908) 152 Cal. 637, 641. The primary right theory may be invoked "when a plaintiff attempts to divide a primary right and enforce it in two suits." *Crowley v. Katleman* (1994) 8 Cal.4th 666, 682. "[I]f the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata*. (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 638-640.)" *Id*.

"The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. (*Slater v. Blackwood* (1975) 15 Cal.3d 791,795 ....)" *Crowley v. Katleman*, supra, 8 Cal.4th at p. 681. "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the legal theory on which liability for that injury is premised." *Id*. In this context, a "cause of action" should not be confused with counts pled in a complaint, "which are merely ways of stating the same cause of action differently." *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860, ft. 1; see also *Slater v. Blackwood*, *supra*, 15 Cal.3d at 796.

C. A trial court has broad discretion in determining a reasonable amount of attorney fees. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." *Id.*

The court must consider such factors as the nature and complexity of the case, the results obtained, the amount of work involved, the available resources, the nature of the issues and the burden of discovery, the skill required and the time consumed, the court's own knowledge and experience, the time spent, and rates charged in the community for similar work. *See Contractors Labor Pool, Inc. v. Westway Contractors* (1997) 53 Cal.App.4th 152, 168; *see also Ghirardo v. Antonioli* (1993) 14 Cal.App.4th 215, 219.

The court has also taken into account the very interesting and learned discussion of the Fourth District Court of Appeal, Div. 1, in *569 East County Boulevard LLC v. Backcountry Against the Dump* (2016) 6 Cal.App.5th 426, which discusses the factors properly considered by the courts in taking up fee applications.

The case law is clear that fees for seeking fees are properly awarded. *Ketchum v. Moses* (2001) 24 Cal.4th 122, 133-34.

Generally, a trial court is not required to provide a detailed explanation of how it arrived at a fee award.

See, e.g., Maria P. v. Riles (1987) 43 Cal.3d 1281, 1294-1295; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 65-67. California courts have explicitly departed from federal law requiring district courts to explain their fee awards with particularity. *See, e.g., Gorman*, *supra*, at pp. 66-67; *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 970.

D. Not cited by defendants in the discussion of Code of Civil Procedure section 1021.5 in their moving papers was *SOHO v. City of San Diego* (2017) 11 Cal.App.5th 154. There, a project proponent/real party in interest which had successfully appealed a judgment granting a petition for mandamus sought attorneys' fees against petitioner SOHO under section 1021.5 following remand. The Fourth District Court of Appeal, Div. 1 (McConnell, J.) held that SOHO was "not the type of party against whom the court may impose such an award because SOHO did nothing to compromise public rights." *Id*. at 158. The learned court went on to note: "the litigation sought to correct what SOHO perceived to be violations of state and local environmental, historic preservation, and land use laws by the City. While ultimately unsuccessful, the litigation was precisely the type of enforcement action section 1021.5 was enacted to promote. ... We, therefore, cannot conclude the litigation was detrimental to the public interest such that imposing a fee award on SOHO would be appropriate. Consequently, we conclude the trial court** did not err in denying the Committee's motion for an award of section 1021.5 attorney fees. *Id*. at 162.
E. Plaintiff also seeks a fee enhancement beyond the $532,000.00 lodestar. Fee enhancements by means of multipliers or otherwise are well recognized in California. *E.g., Serrano v. Priest* (1977) 20 Cal.3d 25 (*Serrano III*); *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407; *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78; *Kern River Public Access Com. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205. Under California law, the trial court begins by fixing the "lodestar" or "touchstone" reflecting a compilation of the time spent and reasonable hourly compensation of each attorney or legal professional involved in the presentation of the case. The court then adjusts this figure in light of a number of factors that militate in favor of *augmentation or diminution*. *Serrano III*, 20 Cal.3d at 48-49 (emphasis by this court).

The purpose of a fee enhancement is not to reward attorneys for litigating certain kinds of cases, but to fix a reasonable fee in a particular action. The Civil Code authorizes an award of *reasonable* attorney fees, not an award of reasonable fees plus an enhancement. Nonetheless, the courts recognize that some form of fee enhancement may be appropriate and necessary to attract competent representation in cases meriting legal assistance. In *Press v. Lucky Stores, Inc*. (1983) 34 Cal.3d 311, 322, our Supreme Court implicitly found that it would be appropriate to enhance an award by means of a multiplier " 'to reflect the broad public impact of the results obtained and to compensate for the high quality of work performed and the contingencies involved in undertaking this litigation.'" This does not mean, however, that the trial courts should enhance the lodestar figure in every case of uncertain outcome or where the work performed was of high quality. The challenge for the trial courts is to make an award that provides fair compensation to the attorneys involved in the litigation at hand and encourages litigation of claims that in the public interest and merit litigation, without encouraging the unnecessary litigation of claims of little public value.

The classic situation justifying an upward adjustment of the lodestar figure was seen in the *Serrano* cases [*Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano I*), *Serrano* v. *Priest* (1976) 18 Cal.3d 728 (*Serrano II*), and *Serrano III*, *supra*, 20 Cal.3d 25]. The litigation there revolved around California's system for financing public schools. The plaintiffs succeeded in overturning the existing system, obtaining an order that it be replaced by a system designed to provide an equitable distribution of state funds between all public schools. The litigation resulted in no fund of money from which attorney fees might be paid, nor did it result in any monetary recovery by the plaintiffs. The plaintiffs were under no obligation to pay their attorneys for their efforts. It appears that the attorneys did, however, receive some

funding from charities or public sources for the purposes of prosecuting cases of the character involved in that action--a factor the court found to be relevant in determining the size of an award of fees. *Serrano III*, *supra*, 20 Cal.3d at p. 49, fn. 24. Finally, an award of fees was uncertain not only because of the complexity and difficulty of the legal issues involved, but because there was no clear statutory authority for shifting attorney fees to the defendant.

The court in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, contrasted that case with the situation in *Serrano III*: "the present case is in essence a personal injury action, brought by a single plaintiff to recover her own economic damages. Weeks and her attorneys had a fee agreement by which her attorneys were assured of a portion of any recovery. In addition, because of the availability of attorney fees under the FEHA, the attorneys had reason to assume that the amount of Weeks's recovery would not limit the amount of fees they ultimately received. Thus, the risk that Weeks's attorneys would not be compensated for their work was no greater than the risk of loss inherent in any contingency fee case; however, because of the availability of statutory fees the possibility of receiving full compensation for litigating the case was greater than that inherent in most contingency fee actions." 63 Cal.App.4th at 1174.

F. The right to recover costs is based entirely on statute. In the absence of an authorizing statute, neither party is entitled to costs. *Garcia v. Hyster Co*. (1994) 28 Cal.App.4th 724, 732. One such statute is Code of Civil Procedure section 1032(b), which provides that a *prevailing party* is entitled to recover costs as a matter of right in any action or proceeding. *See Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 800. Generally speaking, under Code of Civil Procedure section 1032(a)(4), the party with the net monetary recovery is the prevailing party; absent the impact of section 998, the court lacks discretion to deny prevailing party status to such a litigant. *See Chinn v. KMR Prop. Mgmt*. (2008) 166 Cal.App.4th 175, 188.

A party claiming costs must submit a verified memorandum of costs to the court. CRC Rule 3.1700(a). "There is no requirement that copies of bills, invoices, statements, or any other such documents be attached to the memorandum. Only if the costs have been put in issue via a motion to tax costs must supporting documentation be submitted." *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267. Merely objecting to a cost that appears proper on its face does not mean that the party claiming the cost must prove that it was reasonable and necessary.

CRC Rule 3.1700(a) provides:

A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment ... or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case.

G. If the plaintiff recovers a judgment in an "unlimited" civil case that could have been recovered in a limited civil case, i.e., $25,000 or less, the award of costs is discretionary. Code of Civil Procedure § 1033(a); *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989.

However, "the trial court may properly award costs to a plaintiff who recovers less than the jurisdictional amount for an unlimited civil case when he or she reasonably and in good faith initiated the action believing that the ultimate recovery would exceed the jurisdictional limit." *Carter v. Carter* (2010) 188 Cal.App.4th 1038, 1053.

H. The intersection of a prevailing party's right to recover costs and Code of Civil Procedure section 998 was explored several years ago by the 4th District Court of Appeal, Div. 1 in *Litt v. Eisenhower Med. Ctr*. (2015) 237 Cal.App.4th 1217. The Court held that the trial court had "erred in denying [defendant] recovery of expert witness fees." The proper interpretation of section 998 is also at issue in this case, and the aforementioned intersection is also explored in other cases: *Chen v. Interinsurance Exchange of Auto. Club* (2008) 164 Cal.App.4th 117, 120-121 ("As a rule, prevailing parties, such as appellants here, may recover their litigation and trial costs. (§ 1032.) When section 998 applies, it changes that rule. Under that statute, if plaintiffs reject a defendant's offer to compromise and then fail to win a more favorable judgment, the plaintiffs cannot recover their postoffer costs and must pay the costs the defendant incurred after the offer"); and *Peterson v. John Crane, Inc.* (2007) 154 CalApp.4th 498, 504 ("The failure to accept an offer has consequences for a plaintiff who does not obtain a more favorable result at trial. In that event, the plaintiff cannot recover its post-offer costs, must pay the defendant's costs from the time of the offer, and may be held liable (as was the case here) for a reasonable sum to cover the defendant's expert witness fees. (§ 998, subd. (c)(1).)").

3. Evidentiary Objections.

Plaintiff filed a one-page evidentiary objection (ROA 302) to the new matter in the attorney Jacobs' declaration (ROA 300) tendered with defendants' reply in support of defendants' motion for attorneys' fees. A proposed order is not submitted for ruling on the evidentiary objection. *See* CRC 3.1354(c) (proposed order requirement in summary judgment motion context).

The evidentiary objection is sustained. *See San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A*. (2002) 102 Cal.App.4th 308, 316 (due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail); *Zamani v. Carnes* (9th Cir. 2007) 491 F.3d 990, 997 ("[t]he district court need not consider arguments raised for the first time in a reply brief"); *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ("[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"); *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 ("'the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.'")

4. Discussion and Rulings.

A. The motion to tax costs is largely denied.
Plainiff's opposition relates how the costs in plaintiff's memorandum of costs are reasonable and recoverable. Thus, the challenged costs in the memorandum of costs are proper. *See* ROA 296, opposition memorandum, pp. 2-10, and Briggs declaration, paragraphs 2-12, in this respect.
However, plaintiff's opposition identifies one error regarding the second entry for the transcription fees for defendant Kinsey's deposition. In this respect, item no. 4 in the memorandum of costs contains two entries, each for $1,971.40: (1) "Transcription fees (American Reporting Services) – Kinsey, Marin County"; and (2) "Transcription fees (American Reporting Services) – Kinsey & PMQ Deposition". Plaintiff's opposition sufficiently explains that the second entry entitled "Transcription Fees (American Reporting Services) - Kinsey & PMQ Deposition" contains a data entry error and should have been "Videographer Fees (American Legal Video Solutions) – Kinsey & Marin County PMQ" in the sum of $820.00. *See* ROA 296, Briggs declaration, paragraph 1. As such, item no. 4 in plaintiff's memorandum of costs is taxed in the sum of $1,151.40, leaving a balance of $820.00 for the second entry for the transcript fees for defendant Kinsey's deposition.

Deposition costs for transcribing and travel to a necessary deposition are allowed under Code of Civil Procedure section 1033.5(a)(3). *See* Code of Civil Procedure § 1033.5(a)(3). Deposition costs also include the costs of videotaping depositions even though not used at trial. *See Seever v. Copley Press, Inc*. (2006) 141 Cal.App.4th 1550, 1557, 1560. Costs for service of process are recoverable. *See* Code of Civil Procedure § 1033.5(a)(4) Court reporter fees for trial transcripts are recoverable. *See* Code of Civil Procedure § 1033.5(a)(11); *see also Heppler v. J.M. Peters Co*. (1999) 73 Cal.App.4th 1265, 1298 (court reporter fees as established by statute are recoverable).

B. Plaintiff's motion for attorneys' fees is granted to the following extent.

Plaintiff is entitled to an award of attorneys' fees under Public Resources Code sections 30327(b) and 30824 and Code of Civil Procedure section 1021.5. Plaintiff is the prevailing and successful party under these statutes.

The main litigation objective pursued by plaintiff in this action was to shed light on lax *ex parte* disclosure practices at the Commission. This objective was met, with the court finding violations by each of the defendant Commissioners and awarding substantial penalties against each of the defendant Commissioners. Plaintiff's then-nascent lawsuit was likely an impetus for the 2016 changes in Commission procedures which were discussed in the SOD. *See Graham v. DaimlerChrysler Corp*., 34 Cal.4th at 560-61. Also, former elected official and current Commission observer Pam Slater-Price sees improvements in the *ex parte* process following this litigation. *See* ROA 245, Slater-Price declaration, paragraphs 3-5. In addition, defendants do not seriously dispute plaintiff's entitlement to fees under Code of Civil Procedure section 1021.5. As such, plaintiff is the prevailing and successful party in order to recoup fees under Public Resources Code sections 30327(b) and 30824 and Code of Civil Procedure section 1021.5.

As for the hourly rates charged by plaintiff's attorneys, defendants do not quibble with the hourly rates charged. Also, this court has previously affirmed the hourly rates charged by Mr. Briggs ($550/hr.) and his associate attorneys ($225/hr.) in November of 2016. *See SDOG v. Goldsmith*, Case No. 2014-00217, ROA 292 (minutes for November 4, 2016, p. 5). Further, this court in another case found the $550/hr. charge by Mr. Briggs to be "fair". *See SDOG v. City of San Diego,* Case No. 2011-10123, ROA 63 (minutes for January 28, 2013, p. 4). The rates charged by the law clerk and paralegals ($175/hour and $150/hour, respectively) are likewise reasonable under the circumstances.

The court makes these observations having successfully brought fee motions while in practice in San Diego prior to 2005; having ruled on numerous such motions since taking over a civil IC department in 2008; and having ruled on hundreds of fee applications, in a variety of settings, in the last 13 years. This experience has allowed the court to keep current on prevailing rates charged in San Diego for similar work during the relevant timeframe. *See 569 East County Boulevard, LLC*, *supra*, 6 Cal.App.5th at 436-437 ("the trial court is in the best position to value the services rendered by the attorneys in his or her courtroom ... the court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees").

As for the attorney time expended by plaintiff's attorneys, the attorney time expended seems, for the most part, reasonable. Also, defendants fail to point out specific time entries in the billing of plaintiff's attorneys that are excessive and/or inefficient. Stated differently, defendants fail to assert that plaintiff seeks attorneys' fees for unrelated, unreasonable, and/or ancillary work. A review of the tasks in plaintiff's attorney billing suggests reasonableness. *See* ROA 245, Briggs declaration, Exhibit B (billing sheets). Efficiency of attorney time is additionally supported by plaintiff's 5% across-the-board reduction for all legal professionals (except associate-level attorneys Wardenaar and Clarke) and a 40% reduction of hours for associate-level attorneys Wardenaar and Clarke (who expended the most time on the file). *See* ROA 245, Briggs declaration, paragraphs 6-10, in these respects. In addition, an experienced local attorney has reviewed the plaintiff's attorney billing and opines the time expended by plaintiff's attorneys on this case was reasonable. *See* ROA 245, Pfingst declaration, paragraph 3. Nonetheless, the attorney

billing includes transitory billing for two paralegals that are not allowed. *See* ROA 245, supporting memorandum, p. 7:1-2, and Briggs declaration, Exhibit A (paralegal Keri Taylor: 1.25 hours at $150/hr., totaling $178.13; and paralegal Monica Manriguez, 4.5 hours at $150/hr., totaling $641.25). These items are deleted as this is indicia of inefficiency.

Attorneys' fees may include on-line legal research. *See Trustees of Const. Industry and Laborers Health and Welfare Trust v. Redland Ins. Co*. (9th Circuit, 2006) 450 F.3d 1253, 1258 (reasonable charges for computerized research may be recovered as attorneys' fees). As such, the charge for Westlaw legal research, $30,359.20, sought in the motion as a component of attorneys' fees is recoverable as part of the fee award. The charge is identified in ROA 245, Briggs declaration, paragraphs 9-10, and reflects a 20% reduction on the Westlaw rates to eliminate possible inefficiencies or law firm "markup."

As for defendants' request to deny attorneys' fees because of the limited jurisdiction rule (i.e., plaintiff's recovery against several defendants was under $25,000), defendants fail to reference a case that declines attorneys' fees under Code of Civil Procedure section 1021.5 because of the limited jurisdiction rule. Moreover, the plaintiff in good faith believed the penalties would exceed the $25,000 threshold.

Accordingly, plaintiff is entitled to a base attorneys' fee award of $532,615.95, along with $89.95 for related filing fees for its post-trial motions. However, this sum is reduced for the transitory billing for the two paralegals (Keri Taylor, $178.13; and Monica Manriguez, $641.25). This sum is further reduced by $2,750.00 reflecting the reduction set forth in plaintiff's reply relating less time expended in opposing defendants' fee motion. *See* ROA 301, reply memorandum, p. 8:12-20 ($2,750.00 reduction sought "due to less time spent opposing defendants' fee motion"). Therefore, plaintiff is entitled to a base attorneys' fee award of $529,046.57, along with $89.85 for related filing fees for these post-trial motions.

Turning to the requested multiplier, the court grants an upward multiplier of .75 for an addition of $400,000.00. Plaintiff's attorney agreed to pursue this case on a contingent basis since plaintiff lacked money to pay fees. *See* ROA 245, Briggs declaration, paragraph 11, and Burton declaration, paragraphs 3-5. Also, along with the delay in receiving payment, plaintiff's counsel evidently received no interim funding to prosecute the case. Further, many of the issues in the case were novel and difficult, requiring specialized skill and expertise beyond the level expected in the San Diego community. *See* ROA 245, Briggs declaration, paragraph 1, and Burton declaration, paragraph 3. Moreover, a victory for plaintiff was not certain, and the lawsuit "occupied roughly 50% of [plaintiff's attorneys' time] during the last two years". *See* ROA 245, Briggs declaration, paragraph 12. In addition, the lawsuit is of importance to the public; its effect has been observed by members of the public. *See* ROA 245, Slater-Price declaration, paragraphs 4-5. Likewise, the litigation produced exceptional results since commissioners are now more forthcoming in their disclosures of *ex parte* communications. *Id*. Based on these factors, an upward multiplier of .75 is warranted for an addition of $400,000.00 in attorneys' fees.

C. Defendants' motion for attorneys' fees is denied.

Defendants do not qualify for attorneys' fees under Code of Civil Procedure section 1021.5. Defendants are also not prevailing parties entitled to an award of attorneys' fees under any of the fee shifting provisions of the Public Resources Code.

First, defendants, and in particular McClure and Mitchell, have not articulated the enforcement of a public right affecting the public interest to trigger a fee award under Code of Civil Procedure section 1021.15. No evidence is offered that defendants enforced such a right. No evidence is offered that defendants conferred a benefit on a wide segment of the public. No declaration is provided by anyone

stating they would not serve on the Commission had McClure or Mitchell lost on counts four and five. And an award of attorney's fees under the private attorney general doctrine may not be imposed on a litigant who did nothing to adversely affect the public interest. *See e.g., SOHO v. City of San Diego* (2017) 11 Cal.App.5th 154 (an award of attorney's fees under the private attorney general doctrine may not be imposed on a litigant who did nothing to adversely affect the public interest).

Second, defendants are not the prevailing parties entitled to an award of attorneys' fees. Rather, the main litigation objective pursued by plaintiff was to shed light on lax *ex parte* disclosure practices at the Commission and create changes in those practices. This objective was met, with the court finding violations by each of the defendant Commissioners and imposing substantial penalties against each of the defendant Commissioners. Plaintiff's then-nascent lawsuit was likely a catalyst for the 2016 changes in Commission procedures which were discussed in the SOD. *See Graham v. DaimlerChrysler Corp*., 34 Cal.4th at 560-61. *See also Graciano v. Robinson Ford Sales, Inc*. (2006) 144 Cal.App.4th 140, 153, quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433 ("It is settled that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.")

Perhaps plaintiff over-pled its pleadings. However, it is not "necessarily significant that a prevailing plaintiff did not receive all the relief requested." *See Hensley v. Eckerhart, supra*, at 435, fn. 11. Plaintiff, nonetheless, obtained relief in this matter, i.e., substantial penalties against each defendant premised on the lax *ex parte* disclosure practices at the Commission. And based on plaintiff obtaining substantial relief on a significant issue in this case, the claim by claim, disclosure by disclosure analysis of the "primary right" advocated by defendants is disregarded. The primary right offended here was the public's right to have the Commissioners follow the law with respect to ex parte communications and disclosure thereof.

The court clerk is instructed to interlineate the following sums in the judgment taken in this action (ROA 236) in favor of plaintiff: (1) $929,046.57 in attorneys' fees; and (2) $30,261.11 in costs ($31,322.66 minus $1,151.40 plus $89.85 for filing fees for post-trial motions).

Defendants are not entitled to an award of attorneys' fees.

IT IS SO ORDERED.

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* "Technically, a motion to strike challenges the entire costs bill (e.g., on the ground the claimant is not the 'prevailing party'), whereas a motion to tax challenges particular items or amounts. But the terms are often used interchangeably and there is no difference in the procedural rules." *See* Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trial & Evidence* (The Rutter Group 2018), § 17:137.
**The undersigned.

Judge Timothy Taylor