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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

HAROLD P. STURGEON, Plaintiff, v. WILLIAM J. BRATTON, *et al.*, Defendants. and BREAK THE CYCLE, *et al.*, Interveners.	Case No. BC351646 **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT-INTERVENERS' MOTION FOR ATTORNEYS' FEES** DATE: January 8, 2010 TIME: 8:30 a.m. PLACE: Department 58 JUDGE: Honorable Rolf M. Treu ACTION FILED: May 1, 2006

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Plaintiff Harold P. Sturgeon, by counsel, respectfully submits this opposition to Defendant-Interveners' Motion for Attorneys' Fees.

I. INTRODUCTION.

Plaintiff, a taxpayer and resident of the City of Los Angeles, brought this action to enjoin the expenditure of taxpayer funds and taxpayer-financed resources on Special Order 40, a policy of the Los Angeles Police Department ("LAPD") regarding "Undocumented Aliens," as well as the LAPD's practices implementing that policy. Interveners were allowed to voluntarily join this lawsuit on behalf of Defendants, all of whom are public officials, because the Court found the subject matter of this lawsuit to be of "significant interest to many diverse individuals and organizations" and wanted the legal positions of "the widest possible cross-section of the community" to be presented. When they intervened, Interveners voluntarily agreed to waive any claim for attorneys' fees. Despite their clear, unequivocal, and express waiver, Interveners nonetheless seek to renege on that waiver by moving for an award of attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure. Because Interveners waived any claim for fees, because an award of fees would violate Plaintiff's constitutional right to petition, and for the other compelling reasons set forth herein, Interveners' motion should be denied.

II. DISCUSSION.

A. Interveners Waived Any Claim for Fees.

When Interveners sought to join this matter as defendants, Plaintiff objected on multiple grounds, including that Interveners' participation would enlarge the issues to be litigated because Interveners' proposed Complaint in Intervention contained a request for attorneys' fees. At the September 20, 2006 hearing on the motion to intervene, Interveners clearly and unambiguously elected to waive any claim for attorneys' fees in order to moot Plaintiff's objection:

> [By Counsel for Interveners] Your Honor, if the attorney's fees is the one issue that plaintiffs (sic) object to as enlarging the issue in this case, as I said, as far as the substantive issue, we're not enlarging any – **if the fees are the contentious issue, we'd be willing to waive fees in this case.**
>
> * * *

> [By the Court] The court will permit the intervention, will deem the complaint in intervention to be filed and served as of today's date. We'll align the complaint in intervention on the defense side. **The attorney's fees having been waived, the court orders the request for attorney's fees stricken.**

Transcript of September 20, 2006 Hearing, attached as Exhibit B to Plaintiff's Request for Judicial Notice in Opposition to Interveners' Motion for Attorneys' Fees ("Jud. Not. Req.") at 11, 16 (emphasis added).

To try to avoid the obvious conclusion that they waived any claim for fees, Interveners argue that the Court erred in "condition[ing] intervention on Interveners' striking the request for attorney fees from the complaint in intervention." Memorandum of Points and Authorities in Support of Defendant-Interveners' Motion for Attorneys' Fees ("Intvnrs' Mem.") at 4 n.2. The Court never imposed any such condition. Interveners voluntarily waived their request for fees in order to moot Plaintiff's argument that Interveners' participation would enlarge the issues. The Court's order concerning Interveners' fee claim simply was an acknowledgment of that waiver. Moreover, because Interveners did not intervene as a matter of right, but instead were granted permissive intervention, the Court clearly had the discretion to strike Interveners' fee claim as condition of intervention. *See Mary R. v. B&R Corp.* (1983) 149 Cal. App. 3d 308, 314. If, as Interveners contend, the Court erroneously conditioned Interveners' participation on the waiver of their fee request, then the proper course of action would have been for them to appeal the Court's ruling. Not only did Interveners not appeal, but the time for doing so has long since passed.

Nor can Interveners claim that their waiver was limited to fees incurred in the trial court only. They certainly did not limit their voluntary waiver in any way at the September 20, 2006 hearing. Interveners must have expected that, whatever the outcome in the trial court, the matter would likely be appealed. Their waiver was an absolute waiver of any and all claims for attorneys' fees, whether in the trial court or on appeal.

Finally, Plaintiff will suffer substantial harm if Interveners are allowed to renege on their voluntary waiver of attorneys' fees at this late date. Plaintiff objected to the request in a timely manner and relied on the unequivocal waiver of any request for fees made by Interveners at the

September 20, 2006 hearing. Plaintiff may well have chosen a different path if Interveners had not waived their request and if Plaintiff had been on notice that he might be required to pay a substantial fee award at the end of this litigation. He certainly would have appealed the order granting Interveners' motion to intervene. To require Plaintiff to pay attorneys' fees to Interveners after he reasonably relied reasonably on Interveners' unambiguous and unqualified waiver of fees made at the September 20, 2006 hearing would be extraordinarily prejudicial to Plaintiff.

B. Interveners Are Not Entitled to an Award of Fees.

Even if Interveners had not waived any claim for an award of attorneys' fees, they are not entitled to an award. It has long been established that, when a person or entity is permitted to intervene in a pending lawsuit, the intervener is to be regarded as a plaintiff or a defendant and "is limited to the same procedure and remedies as is such original party, either for the purpose of defeating the action or resisting the claim of the plaintiff." *Boskowitz v. Thompson* (1904) 144 Cal. 724, 729. As Interveners note, more recently it has been held that

> when a party qualifies and enters an action as an intervener, it is vested 'with all of the same procedural rights and remedies of the original parties,' including the right to seek attorneys' fees under section 1021.5 in a public interest lawsuit **on equal terms with the original parties.**

Intvnrs' Mem. at 9 (citing, *City of Santa Monica v. Stewart* (2005) 126 Cal. App. 4th 43, 87) (emphasis added).

Interveners sought and obtained permission to enter this action on behalf of defendants, who undeniably are public officials sued in their official capacities. Section 1021.5 of the Code of Civil Procedure expressly exempts government actors from recovering awards of attorneys' fees against private parties: "With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities . . . ." Code Civ. Proc. § 1021.5; *People ex. rel. Cooper v. Mitchell Brothers' Santa Ana Theater* (1985) 165 Cal. App. 3d 378, 386 (city attorney acting in his official capacity deemed to be a "public entity" for purposes of section 1021.5). Because Defendants cannot recover attorneys' fees from Plaintiff under section

1021.5 and Interveners are "limited to the same procedures and remedies" available to Defendants (*Boskowitz*, 144 Cal. 729), Interveners cannot recover fees from Plaintiff either.

Notably, Interveners do not cite a single case in which a person or entity intervened on behalf of a government entity and was awarded attorneys' fees from a private party plaintiff under section 1021.5. Nor has Plaintiff been able to identify any such case. Interveners themselves characterize the circumstances of their request as "undoubtedly rare." Intvnrs' Mem. at 1. It is more than rare; it is unprecedented. It also is contrary to both the law governing intervention and section 1021.5.

It also would violate Plaintiff's constitutional rights. The Supreme Court of California has recognized that "the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection." *City of Long Beach v. Bozek* (1982) 31 Cal. 3d 527, 534. "The right of petition, like the right of free speech, is 'of the essence of [a person's] guaranteed personal liberty.'" *Id.* at 536 (quoting, *DeJong v. Oregon* (1937) 299 U.S. 353, 366. It is accorded "a paramount and preferred place in our democratic system." *Id.* at 532 (quoting, *American Civil Liberties Union v. Board of Education* (1961) 55 Cal. 2d 167, 178). "Like the right of free speech, it should be scrupulously protected." *Id.* at 536; *see also Wolfgram v. Wells Fargo Bank* (1997) 53 Cal. App. 4th 43, 57 ("[A]ny impairment of the right to petition, including any penalty after the fact, must be narrowly drawn").

Plaintiff sued the Chief of Police and members of the Board of Police Commissioners. Plaintiff did not sue Interveners. Rather, Interveners voluntarily joined this lawsuit on the side of Defendants. Requiring Plaintiff to pay attorneys' fees to private entities who voluntarily intervened on behalf of public officials sued in their official capacities would impermissibly punish Plaintiff for exercising his right to petition under both the U.S. Constitution and the California Constitution. U.S. Const., amend. I; Cal. Const., art. I, § 3. It also would have a substantial chilling effect on other plaintiffs who might consider suing government officials or challenging governmental policies or practices in the future. *Bozek*, 31 Cal. 3d at 535. Section 1021.5, the same statute Interveners invoke here, was intended to encourage meritorious, public

interest lawsuits by awarding attorneys' fees to successful plaintiffs, not punish unsuccessful plaintiffs by awarding attorneys' fees to interveners who voluntarily join lawsuits as defendants in lawsuits brought against the government. Future taxpayers will be less likely to challenge government actions in court if they know they could be required to pay the attorneys' fees of persons or entities who might seek to intervene on behalf of the government.[1]

Such a result also would be particularly anomalous in the context of taxpayer lawsuits such as this one, brought under Code of Civil Procedure Section 526a. It is well-established that the "primary purpose" of section 526a is to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." *Blair v. Pitchess*, (1971) 5 Cal. 3d 258, 267-68. Rather than encouraging taxpayers to challenge allegedly unlawful expenditures of public resources, requiring taxpayers to pay the attorneys' fees of private parties who intervene would discourage such suits and undermine the purpose of section 526a.

C. Interveners Cannot Satisfy Section 1021.5.

The private attorney general doctrine is one of several exceptions to the general rule that each party must bear its own attorneys' fees. *Bouvia v. County of Los Angeles* (1987) 195 Cal. App. 3d 1075, 1082. Originally developed by the courts pursuant to their inherent equitable powers, the doctrine was given statutory recognition with the enactment of Code of Civil Procedure section 1021.5. *Id.* The statute seeks to encourage the presentation of meritorious claims affecting large number of persons by providing successful litigants attorneys' fees in public interest lawsuits. *Id.* The doctrine itself rests upon the recognition that privately initiated lawsuits are often essential to effectuate important rights embodied in constitutional or statutory

[1] Ironically, after recently losing a high profile First Amendment case against the City of Costa Mesa, Interveners' counsel was quoted as stating, "We still believe in the principle of free speech rights and the right of residents of Costa Mesa and other cities across Orange County to openly criticize their city officials." Ellyn Pak, "Jury: Costa Mesa did not violate Latino activist's rights," *Orange County Register*, December 14, 2009.

provisions, and that, without some mechanism authorizing the award of fees, private actions to enforce such important rights will, as a practical matter, frequently be infeasible. *Id.*

A court may award attorneys' fees under section 1021.5 only if the statute's requirements are satisfied. *Vasquez v. State of California* (2008) 45 Cal. 4th 243, 250. Thus, a court may award fees to "a successful party" only if the action has "resulted in the enforcement of an important right affecting the public interest." *Id.* (quoting, Code Civ. Proc. 1021.5). Three additional elements also must be satisfied: "(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."[2] *Id.*

Section 1021.5 codified the courts' traditional equitable discretion concerning attorneys' fees, and, within the statute's parameters, courts retain considerable discretion. *Id.* In deciding whether to award fees, a court "must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under a private attorney general theory." *Id.* (quoting, *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal. 3d 917, 938 ("*Woodland Hills*").

Obviously, Interveners did not initiate this action, but instead voluntarily joined on the side of Defendants even though Defendants already were well-represented by the City Attorney's office. The typical justification for an award of attorneys' fees -- to provide an incentive for privately initiated actions that enforce important rights for large numbers of persons -- simply does not exists here.

1. Interveners Have Not Enforced Any Cognizable Right.

Interveners fail to demonstrate that they enforced any cognizable right, much less an "important right affecting the public interest." Plaintiff's lawsuit challenged a policy choice of

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[2] This third element does not apply here.

the LAPD and various practices implementing that policy. The pertinent provision of the policy, often referred to as Special Order 40, states, "Officers shall not initiate a police action where the objective is to discover the alien status of a person." Ruling on Submitted Matter, attached to Jud. Not. Req. as Exhibit E, at 6. The outcome of the lawsuit was that Special Order 40 survived a facial challenge. Only the *text* of the policy, not the practices implementing the policy, was determined not to conflict with two federal statutes, 8 U.S.C. §§ 1373 and 1644, and one California statute, Penal Code § 834b.[3]

Notably, the Court rejected Interveners' request to be allowed to join this lawsuit as a matter of right. The Court allowed permissive intervention not because Interveners claimed to be protecting any particular right, but because it found "[t]he case before the Court . . . is of significant interest to many diverse individuals and organizations." Ruling on Submitted Matter, attached to Jud. Not. Req. as Exhibit E, at 1. The Court stated that it wanted "the legal positions of the widest possible cross-section of the community [to] be presented." *Id.* at 2. Having an interest in a matter clearly is not the same has having a legal right. Likewise, having a legal position on a matter is clearly different from having a legal right. While Interveners may have been interested in Special Order 40 and may have taken a legal position on this particular police policy, section 1021.5 is implicated only when "important rights" are enforced.

Interveners' claim that they have enforced an "important right" is illusory. It is not even clear what "right" Interveners claim to have enforced. In the section of their brief purportedly addressing this inquiry, Interveners reference "federal preemption," "fundamental principles of our federal system of government," and the concurrent sovereignty of the states "subject only to the limitations imposed by the Supremacy Clause." Intvnrs' Mem. at 10. Federal preemption, principles of federalism, and state sovereignty are not "rights," however. As Interveners themselves acknowledge, they are structural principles underlying the federal system of government in the United States. *Id.* Interveners cite no authority supporting the proposition that

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[3] The Court did not reach the question of whether the LAPD's practices under Special Order 40, which Plaintiff also had challenged, were consistent or in conflict with federal or state law. Ruling on Submitted Matter, attached to Jud. Not. Req. as Exhibit E.

there is a "right" to federal preemption, principles of federalism, or state sovereignty. Indeed, the U.S. Supreme Court has held otherwise. *Chapman v. Houston Welfare Rights Organization* (1979) 441 U. S. 600, 613 (holding that the Supremacy Clause is not a right-securing clause, but a clause requiring federal law to prevail when there is a conflict with a law based on state power).

Elsewhere, Interveners make reference to the "existing right of immigrants to be free of victimization because of their immigration status and to make contact with police officers without fear of detection and deportation." Intvnrs' Mem. at 4. Interveners make no effort to identify the source of this allegedly existing right. It is not even clear if Interveners are referring to one alleged right or two separate, alleged rights. Interveners' generalized reference to a "right to be free of victimization because of immigration status" is too broad to analyze as a legal right. Because Interveners do not even attempt to identify this alleged right in any meaningful way, Interveners have not demonstrated how it could qualify as an "important right affecting the public interest" for purposes of a fee award under section 1021.5.

Similarly, Interveners do not identify any constitutional, statutory, or other source of law recognizing the alleged right of aliens who are not lawfully present in the United States to avoid detection or deportation. "Enforcement" of this non-existent right cannot support a fee award.

Nor can Interveners claim to have enforced equal protection rights. On its face, Special Order 40 does not establish or differentiate between classes of persons. It does not allow officers to initiate police actions where the objective is to discover the alien status of some classifications of persons, but not others. It does not differentiate between aliens and non-aliens. It expressly applies to all persons. Equal protection is not even implicated.

To the extent that Interveners might claim to have enforced the equal protection rights of aliens who are not lawfully present in the United States, it has long been established that such persons are not a "suspect class." *Plyler v. Doe* (1982) 457 U.S. 202, 220, 223 ("undocumented status" is not an immutable characteristic "since it is the product of conscious, indeed unlawful, action"). Since aliens who are not lawfully present in the United States are not a suspect class, they do not enjoy any special equal protection rights arising from their illegal status.

Nor can Interveners claim to have enforced any alleged right of persons not to be asked about their immigration status. The U.S. Supreme Court has held that local police officers do not need independent, reasonable suspicion to inquire about a person's immigration status. *Muehler v. Mena* (2005) 544 U.S. 93, 101. Plaintiff never contended that officers could stop persons randomly on the street and inquire about their immigration status solely because of their appearance or language. *See*, *e.g.*, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, attached to Jud. Not. Req. as Exhibit D, at 20. Rather, Plaintiff has maintained that such conduct would likely violate the LAPD's prohibition on racial profiling. *Id.* Because Interveners have not demonstrated that their voluntary involvement in this lawsuit resulted in the enforcement of any congnizable legal right, they are not entitled to an award of attorneys' fees under section 1021.5.

2. Interveners Have Not Conferred Any Significant Benefit on the General Public or a Large Class of Persons.

Since Interveners have not demonstrated that they enforced any cognizable "right" by intervening in Plaintiff's taxpayer lawsuit, it is not necessary to consider whether the enforcement of such a right "affected the public interest" or whether Interveners conferred a "significant benefit on the general public or a large class of persons." Interveners certainly have not affected or conferred any lasting benefit, significant or otherwise, on the general public or anyone else because, regardless of the outcome of this litigation, the LAPD could change Special Order 40 tomorrow if it were so inclined.

Interveners' claims that they "affected the public interest" and conferred a "substantial benefit on a large number of people in Los Angeles and beyond" do not withstand scrutiny. Intvnrs' Mem. at 10, 11. Interveners make a generalized claim of having benefitted public safety in Los Angeles. *Id.* They hypothesize that Special Order 40 builds trust and encourages members of the "immigrant community" to come forward to report crimes and to provide

information to the police.[4] *Id.* They speculate that, if Plaintiff had been successful, immigrants who are victims or witnesses would be deterred from contacting the police out of fear of "detection and deportation."[5] *Id.* at 4.

Of course, lawful immigrants have no reason to fear "detection or deportation" if they contact the police to report a crime or come forward with information about criminal activity. It is only unlawful immigrants or other aliens not present in the United States legally who may have reason to fear "detection or deportation." Interveners thus conferred no "benefit" on lawful immigrants. With respect to unlawful immigrants and other persons not legally present in the United States, Interveners do not even acknowledge, much less try to refute, the obviously compelling public interest in the enforcement of federal immigration laws and the obvious public benefits that result from respecting the rule of law. *Woodland Hills*, 23 Cal. 3d 917, 939 ("the public always has a significant interest in seeking that legal strictures are properly enforced and, thus, in a real sense, the public always derives a 'benefit' when illegal private or public conduct is rectified").

Nonetheless, like the alleged "right" that Interveners claim to have enforced, Interveners' assertion that they have conferred a substantial benefit on a large number of people in Los Angeles, apparently by allowing illegal aliens to remain undetected and undiscovered, is an illusion. Interveners' argument ignores the actual language of Special Order 40. Again, Special Order 40 states in pertinent part, "Officers shall not initiate police action where the objective is to discover the alien status of a person."[6] This Court ruled that Special Order 40 "neither mentions nor refers" to communications between police officers and federal immigration officials

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[4] Interveners provide no surveys or statistical evidence demonstrating that members of the "immigrant community" are more likely to come forward because of Special Order 40. Nor do they provide any other evidence, anecdotal or otherwise, demonstrating that this is the case.

[5] Again, Interveners provide no evidence demonstrating that this is likely to occur.

[6] Plaintiff did not challenge the portion of the policy that states "[o]fficers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)." Interveners' Respondents' (sic) Brief, attached to Jud. Not. Req. as Exhibit E, at 5.

"regarding the immigration status of an individual" and "does not prohibit or restrict such communication." *See* Ruling on Submitted Matter, attached to Jud. Not. Req. as Exhibit E, at 8 and 9. Thus, Special Order 40 does *not* limit the ability of an officer to contact federal immigration officials to inquire about any person's immigration status or to report a suspected illegal alien. If a victim or witness approaches the LAPD to report a crime or provide information about crime and an officer suspects or learns that the victim or witness is an alien in the United States unlawfully, this Court has held that Special Order 40 does *not* prohibit or restrict that officer from contacting federal immigration officials to inquire about the victim's or witness' immigration status or to report his or her unlawful status.

Nor does Special Order 40 prevent an officer from asking a person about his or her immigration status. In their summary judgment motion, Defendants asserted that officers have the discretion to inquire about any person's immigration status so long as the inquiry is undertaken as part of a criminal investigation. *See* Defendants' Undisputed Facts in Support of Motion for Summary Judgment or in the Alternative, Summary Adjudication; Exhibits; Declarations, attached to Jud. Not. Req. as Exhibit C, at Undisputed Fact No. 44. In support of this assertion, Defendants cited the deposition of Deputy Chief Sergio Diaz, who testified:

> Here's the one instance under which you should not inquire. If this is your only -- your only reason for making this contact, for initiating action is to discover the alien status of an individual, don't do it. If you're doing anything -- anything else that's legitimate" -- and we don't even go that far. We stop there. Don't do this. So if, during the course of an investigation -- And, again, the possibilities are endless . . . But if, during the course of an investigation, you feel the need to appropriately ask about a person's immigration status, you can do that.

Id. (citing, Diaz Dep. at 37:6-21); *see also id.* at Undisputed Fact No. 15 ("Special Order 40 only prohibits police action whether the sole objective is to ascertain immigration status"). The Court of Appeal found that "all of the LAPD witnesses agreed that [Special Order 40] . . . prohibits *initiating an investigation into an individual solely to determine that person's immigration status.*" *Sturgeon v. Bratton* (2009) 174 Cal. App. 4th 1407, 1415 (emphasis original). Thus, according to the LAPD and the Court of Appeal, Special Order 40 does not prohibit or restrict an

officer from asking a victim, witness, or any other person about his or her immigration status so long as the inquiry is part of a criminal investigation.

In sum, according to the LAPD, this Court, and the Court of Appeal, on its face Special Order 40 does not actually do what Interveners claim it does. It does not prevent officers from contacting federal immigration officials to obtain information about a person's immigration status or to report a person who is suspected or known to be an alien unlawfully present in the United States. Nor does it prevent officers from asking victims, witnesses, or any other persons about their immigration status so long as it is part of a criminal investigation. The notion that, because of Special Order 40, an illegal alien who contacts the police to reports a crime or provide information about criminal activity will not have his or her status asked about, discovered, or reported to federal immigration officials is simply false. The "substantial benefit" Interveners claim to have conferred on "a large number of people in Los Angeles" does not exist.[7]

Nor can Interveners claim to have conferred a substantial benefit on persons beyond the City of Los Angeles by reason of the alleged precedential value of the Court's ruling. Again, the Court's ruling was limited to an analysis of Special Order 40 on its face. While it certainly is the case that other cities may have policies like Special Order 40, Interveners have presented no evidence demonstrating that other cities have adopted policies that, on their face, are identical to Special Order 40. It is likely that there are a wide range of such policies and that each has its own unique language. By way of example, the City of San Francisco has a very specific policy, as does the City of Chicago. Jud. Not. Req. at Exhibits H and I. Obviously, such policies would have to be analyzed based on their unique language.

[7] Nor can Interveners claim that, without Special Order 40, officers could stop persons based on their appearance or language and inquire about their immigration status. Such conduct would be prohibited by the LAPD's prohibition on racial profiling. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, attached to Jud. Not. Req. as Exhibit D, at 20.

3. No "Private Enforcement" Was Necessary.

Interveners cannot demonstrate that the "necessity and financial burden of private enforcement" in this case makes an award of fees appropriate. Code Civ. Proc. § 1021.5. Importantly, Interveners only seek fees "for their work on the appeal." Intvnrs' Mem. at 7. Therefore, the Court's inquiry in determining whether the "necessity and financial burden of private enforcement" justifies a fee award should focus solely on the appeal.

Interveners ignore the fact that they only seek fees on appeal, however, and argue that the Court should look at the proceedings before both this Court and before the Court of Appeal. Interveners claim that they "advanced significant theories adopted by this Court and affirmed by the Court of Appeal, which were not advanced by the governmental entity." Intvnrs' Mem. at 13. Interveners' claim is belied by this Court's own ruling, which found that "all parties have well and diligently briefed the pertinent issues for the Court's consideration" and noted that:

> Defendants and Interveners bring their motions on the same grounds, to wit:
>
> 1. Plaintiff's attack on Special Order 40 is facial, as opposed to an as applied challenge.
>
> 2. Plaintiff cannot show that Special Order 40 conflicts with federal or state law.

See Ruling on Submitted Matter, attached to Jud. Not. Req. as Exhibit E, at 4.

Interveners rely heavily on *Walmart Real Estate Bus. Trust v. City Council* (2005) 132 Cal. App. 4th 614 ("*Walmart*"). At issue in *Walmart* was whether two private parties named as real parties in interest in a mandamus action against a municipality could recover attorneys' fees from the petitioner.[8] The trial court denied the real parties in interests' motion for fees and, in reviewing the denial, the Court of Appeal asked, "Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material *non de minimis* contribution to its judgment, which were nonduplicative of those advanced by the governmental entity?" *Id.* at 623 (quoting, *Comm. to Defend Reprod. Rights v. A Free Pregnancy Ctr.* (1991)

[8] Unlike in this case, in which Plaintiff named only public officials, in their official capacities, as defendants and Interveners voluntarily joined this suit on the side the defendants, the petitioner in *Walmart* had sued the private parties as real parties in interest.

229 Cal. App. 3d 633, 642-43). There are at least two significant differences between *Walmart* and the case before this Court, however.

First, the municipality had not opposed the writ of mandate sought by the petitioner. *Walmart*, 132 Cal. App. 4th at 618. In fact, the municipality did not present any arguments to the trial court; it simply asked the trial court for guidance. *Id.* By contrast, the real parties in interest opposed the issuance of a writ and challenged the merits of the petitioner's arguments. *Id.* at 622. As the Court of Appeal noted, "public enforcement was ***not*** being effectively pursued." *Id.* at 624 (emphasis added). Unlike the municipality in *Walmart*, Defendants in this case actively and ably defended this Court's ruling by filing a comprehensive, 38-page appellate brief and by appearing and arguing at oral argument.

Second, in *Walmart*, the private enforcement by the real parties in interest had occurred at the trial court level. Because the petitioner did not appeal, there was no question about the necessity of defending the trial court's denial of mandamus relief. Here, Interveners contend that it was necessary for them to defend this Court's ruling because, they claim, Defendants allegedly "made no mention of facial versus as-applied challenges, let alone ma[d]e any attempt to defend this Court's reliance on or application of this distinction." Intvnrs' Mem. at 14. Not only is this a misreading of Defendants' appellate brief (*see*, *e.g.*, Respondents' Brief, attached to Jud. Not. Req. as Exhibit G, at 21-27),[9] but it also is incorrect as a matter of law. As Defendants succinctly argued to the Court of Appeal, "[I]t is the Trial Court's substantive ruling, not judicial reasoning or argument, that is the subject of review." *Id.* at 19 (citing, *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 330). Because it was this Court's decision to grant summary judgment in favor of Defendants and Interveners, not the reasoning behind that decision, that was on appeal, Interveners cannot satisfy section 1021.5 by claiming their participation in the appeal was

[9] Interveners make the same erroneous argument concerning Penal Code § 834b. Intvnrs' Mem. at 15. Again, Defendants actively and ably defended this Court's ruling with respect to Penal Code § 834b. Respondents' Brief, attached to Jud. Not. Req. as Exhibit G, at 36.

"necessary" to defend the Court's reasoning.[10] Interveners' participation in the appeal was not "necessary" within the meaning of section 1021.5 because Defendants actively and ably participated in the appeal and Interveners' efforts were largely duplicative of Defendants' work.

In addition, Interveners also fail to demonstrate that "the cost of [their] legal victory transcends [their] personal interest in the subject of the suit." *Edgerton v. State Pers. Bd.* (2000) 83 Cal. App. 4th 1350, 1362. This burden lies with Interveners. *Riverwatch v. County of San Diego Dep't of Envtl. Health*, (2009) 175 Cal. App. 4th 768, 777. To try to satisfy this burden, Interveners claim the "disproporationality requirement" has been met because they allegedly had no pecuniary interest in the outcome of the case. Intvnrs' Mem. at 18.

First, it is irrelevant how much time Interveners' attorneys claim to have spent on this matter at the trial court level. Again, the only issue before the Court is whether Interveners are entitled to attorneys' fees for the appeal. *Id.* at 7. Therefore, the relevant question is whether the attorneys' fees allegedly incurred on appeal are proportionally more than the value of Interveners' alleged interests in the outcome. While Interveners seek an award of approximately $75,000, a substantial portion of this figure is for time allegedly spent preparing Interveners' motion for fees. Plaintiff submits that time spent preparing a motion for fees should not be considered in any "proportionality" analysis because it does not reflect the "cost of the legal victory" but instead reflects the cost of the fee motion. *Woodland Hills*, 23 Cal. 3d at 941.

Second, Interveners' claim that they had no pecuniary interest in the outcome of this litigation directly contradicts prior statements Interveners made to this Court. In seeking to intervene in this action, Interveners represented that "Break the Cycle will be forced to divert resources away from its mission," that Los Jornaleros "would not engage in activity publicly indicating their ability for day work," and that members of El Comite de Jornaleros "would not engage in activity publicly indicating their availability for day work." Memorandum of Points and Authorities and Declarations in Support of Motion for Leave to File Complaint in Intervention, attached to Jud. Not. Req. as Exhibit A, at 2-3. In all three instances, Interveners

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[10] Of course, this Court's ruling was available to the Court of Appeal to review.

sought intervention to protect their pecuniary interests, specifically, monetary resources and income. Similarly, Instituto de Educacion Popular del Sur de California ("IDEPSCA") represented that "[t]he City would have to terminate its contracts with IDEPSCA because managing the job centers and organizing the street corners would cease to be effective. This would cause significant economic harm to IDEPSCA: the City contracts make up about two-thirds of IDEPSCA's budget." *Id.* at Declaration of Raul Anorve, ¶ 16. It also was represented that the undocumented day laborers who are members of Los Jornaleros, "would be unable to look for work as they do now" and that "[i]t would be difficult, if not impossible, for them to make themselves known to potential employers if they could not gather freely in public places." *Id.* at Declaration of Mario Lopez, ¶ 12. Likewise, Break the Cycle represented that it "would be forced to divert resources away from our mission. Significant time and effort would be diverted." *Id.* at Declaration of Jessica Arnoff, ¶ 13. While Plaintiff does not concede that any of these claims are well-founded or they would have resulted if the Court had enjoined the expenditure of any additional taxpayer funds on Special Order 40, Interveners' own prior statements contradict their claims that they had no financial interest in the outcome of this litigation. Consequently, Interveners have not satisfied their burden of demonstrating that the attorneys' fees they allegedly incurred on appeal transcended the potential monetary losses of terminated contracts, lost wages, and diverted resources they claimed they would suffer as a result of an adverse ruling in this litigation.

In sum, Interveners fail to show that it was necessary for them to participate in the appeal of this matter or that the financial burden they allegedly incurred in participating in the appeal outweighed their own financial interests. Consequently, Interveners fail to satisfy this necessary element of any fee recovery as well.

D. <u>Interveners' Fee Request Is Not Reasonable</u>.

In the unlikely event that the Court finds Interveners are entitled to an award of fees, the amount of fees that Interveners seek is not reasonable and should be reduced substantially. The amount of the attorneys' fees to be awarded is within the sound discretion of the trial court.

Akins v. Enterprise Rent-A-Car Co. (2000) 79 Cal. App. 4th 1127, 1134. The trial court is the best judge of the value of the professional services rendered by the attorneys in this case. *Id.*

Interveners seek an astonishing $525 per hour for Hector O. Villagra and $425 per hour for Belinda Escobosa Helzer. Both rates are at the very top of the range of rates set forth in the declaration of Carol Sobel and accompanying materials submitted by Interveners. According to Ms. Sobel's declaration and the exhibits thereto, attorneys with similar degrees of experience to Mr. Villagra, a 1994 law school graduate, and Ms. Escobosa Helzer, a 2000 law school graduate, range between $480-525 and $380-425, respectively. *See* Declaration of Carol Sobel in Support of Defendant-Interveners' Motion for Attorneys' Fees at Exhibit B ($525 per hour rate for 1994 graduate Peter Eliasberg) and Exhibit C ($480 per hour rate for 1994 graduate Yvonne Simon, $490 per hour rate for 1994 graduate Peter Eliasberg, $425 per hour rate for 2000 graduate Negin Mirmirani, $390 per hour rate for 2000 graduate Wyeth McAdam, and $380 per hour rate for 2000 graduate Ben Wizner). Coupled with the fact that Interveners' efforts only supplemented the already substantial efforts put forward by counsel from the City Attorney's office, who actively and ably defended this Court's ruling before the Court of Appeal, a substantial downward adjustment of the hourly rates requested by Interveners is warranted. Declaration of Paul J. Orfanedes in Opposition to Interveners' Motion for Attorneys' Fees ("PJO Decl.") at ¶ 4.

The amount of time for which Interveners seek compensation also is unreasonable. The single largest component of attorney and paralegal time for which Interveners seek compensation consists of time allegedly spent preparing Interveners' fee motion. Interveners claim to have spent 61.4 hours preparing the motion, including 15.4 hours preparing an itemization of attorney and paralegal time. PJO Decl. at ¶ 5. The overwhelming majority of time allegedly incurred on the actual appeal allegedly was spent preparing for oral argument. *Id.* Interveners request compensation for 57.7 hours preparing for an argument that did not last more than 30 minutes. *Id.* at ¶¶ 4 and 5. By comparison, Interveners claim to have spent 29.6 hours preparing their appellate brief, which is perhaps the most important part of any appeal. *Id.* at ¶ 5. Interveners claim to have spent 9.0 hours and 5.4 hours, respectively, on research and miscellaneous matters.

Id. at ¶ 5. Coupled again with the fact that Interveners' efforts only supplemented the already substantial efforts put forward by counsel from the City Attorney's office, who actively and ably defended this Court's ruling before the Court of Appeal, a substantial downward adjustment is warranted for both the preparation of the fee motion and preparation for oral argument.

Moreover, a comparison of Interveners' appellate brief and Interveners' memorandum of points and authorities in support of their motion for summary judgment reveals that large portions of Interveners' appellate brief were taken substantially, if not verbatim, from the memorandum of points and authorities. PJO Decl. at ¶¶ 6 and 7. Approximately 28 pages of the 44 page brief Interveners submitted to the appellate court appear to come directly from Interveners' memorandum of points and authorities. *Id.* Given the substantial overlap between the two documents, the amount of time that Interveners claim to have spent on their appellate brief is excessive, and a downward adjustment is appropriate.

In addition, at least three entries appear to be duplicative. Interveners' itemization appears to contain double entries for time allegedly spent by Mr. Villagra on September 10, 2009; September 24, 2009; and September 25, 2009. Both the amount of time spent and the descriptions of work allegedly performed by Mr. Villagra are identical for each of these days. The entries should not be double counted.

Plaintiff also objects to the fact that the highest-billing attorney, Mr. Villagra, worked almost exclusively on Interveners' motion for fees. A more junior attorney should have performed at least some of this work, and any award should be adjusted downward to reflect what should have been a more economical use of resources.

Finally, to the extent that the Court awards fees, Plaintiff requests specific factual findings be made explaining the calculation of any award, including the particular hours allowed in calculating any award. *California Common Cause v. Duffy* (1987) 200 Cal. App. 3d 730, 754-55.

III. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that Defendant-Interveners' Motion for Attorneys' Fees be denied.

Dated: December 23, 2009

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PROOF OF SERVICE BY MAIL

I am employed in the City of Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 501 School Street, S.W., Suite 700, Washington, DC 20024.

On December 23, 2009, I served the foregoing document:

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT-INTERVENERS' MOTION FOR ATTORNEYS' FEES

on the interested parties in this action by placing a true and correct copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[ ] **BY MAIL:** I caused such envelope to be deposited in the U.S. mail, with postage thereon fully prepaid, at Washington, D.C. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at Washington, D.C. in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

[X] **BY FEDERAL EXPRESS:** I placed such envelope for deposit in the Federal Express drop slot for service by Federal Express on the next business day. I am "readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with Federal Express on that same day at Washington, D.C. in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if service is more than one day after date of deposit for express service in affidavit.

[ ] **BY PERSONAL SERVICE:** I delivered such envelope to the offices of the addresses(s) with delivery time prior to 5:00 p.m. on the date specified above.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 8, 2010 at Washington, D.C.

DAVID F. ROTHSTEIN

SERVICE LIST

Sturgeon v. Bratton, et al.,
Case No. BC 351646

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