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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YOLO

DAN CARSON, *Petitioner*, v. ZOE S. MIRABILE, in her official capacity as DAVIS CITY CLERK, and JESSE SALINAS, in his official capacity as YOLO COUNTY ASSESSOR/CLERK RECORDER/REGISTRAR OF VOTERS *Respondents*.	Case No.: CV2022-0451 **REAL PARTIES IN INTEREST MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1021.5**
ALAN PRYOR, an individual; MICHAEL CORBETT, an individual; STEPHEN WHEELER, an individual; DARELL DICKEY, an individual; JULIETTE BECK, an individual; and ROBERTA MILLSTEIN, an individual, *Real Parties in Interest*.	Judge: Hon. Daniel Maguire Dept.: 5 Date: April 29, 2022 Time: 9 AM

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INTRODUCTION

Real Parties in Interest Alan Pryor, Michael Corbett, Stephen Wheeler, Darell Dickey, Juliette Beck, and Roberta Millstein ("Real Parties") are all private citizens and voters in Davis who, in the exercise of their speech rights and their civic duty, signed a ballot argument against Measure H on the June 2022 ballot in the City of Davis. In return for their public participation, City Councilmember Dan Carson (in his personal capacity, with counsel funded by the developer of DiSC 2022, at the developer's own admission) filed a lawsuit challenging statements in their arguments as "false or misleading," demanding that this Court delete wholesale sentences or words that would have significantly altered the message and meaning of Real Parties' ballot argument. On the shortest of notice, Real Parties were required to search high and low for a lawyer with the expertise and availability to defend the statements in the ballot argument. Not only would this lawyer have to be familiar with the First Amendment principles that govern ballot arguments, that lawyer would have to be capable and willing to delve into the details of the ballot measure, along with its lengthy history, its environmental review, and the workings of Davis Measure J, which brought Measure H to the ballot. In short, it was no small task, and Real Parties' financial resources were not vast.

Real Parties reached an agreement with counsel to represent them on a partially contingent basis, premised on the possibility of seeking a fee award under Code of Civil Procedure section 1021.5. The retainer deposit alone wiped out the group's bank account. Yet Real Parties had no other choice if they wanted to exercise their speech rights and communicate their opinions about Measure H to the voters. Petitioner Carson's lawsuit thus had a twin effect: it made campaign fodder against Measure H's opponents, and it wiped out their resources to communicate with the voters and counter that message. The ballot argument was now their *only* hope of communicating with the voters.

Real Parties' and their attorneys thus put their all into the opposition, explaining in thorough detail why the arguments that were challenged were neither false nor misleading. This Court by and large agreed. In the minor instances where the Court ordered changes, these changes reflected what Real Parties agreed to, preserving the meaning and message in the ballot argument intact. Real Parties thwarted Petitioner's effort to modify the meaning of their argument, and Real Parties were able to present information and argument concerning Measure H *exactly how Real Parties sought to*. The

courts have held that defending against these types of efforts to alter ballot arguments enforces an important public right for the benefit of the affect voters, qualifying for an award of attorneys' fees under Code of Civil Procedure section 1021.5.

Real Parties prevailed in an action enforcing important public rights to the benefit of all citizens of Davis. Real Parties therefore respectfully request that this Court award Real Parties reasonable attorneys' fees and costs in the amount of $71,488.85. This total includes 70.7 attorney hours on the merits ($44,390.50 in fees), along with 30.9 hours on the fee motion ($16,942.50 in fees), $9,000 estimated time for reply to the fee motion, and $1,155.85 in costs.[1]

STATEMENT OF FACTS

On June 7, 2022, voters in the City of Davis will vote "yes" or "no" on Measure H, which concerns the construction of the Davis Innovation and Sustainability Campus (DiSC 2022), a large mixed commercial and residential development outside of Davis city limits. The ballot arguments in the Voter Information Pamphlet provide a forum for supporters and opponents to make their respective cases to the voters as to why they believe Measure H should be adopted or rejected — typifying the "'uninhibited, robust, and wide-open' debate" of the democratic process. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340.) Real Parties were the authors of the Argument Against Measure H.

As required by the Elections Code, the City of Davis posted the ballot arguments for a ten-day public examination period. (Elec. Code, § 9295, subd. (a).) At 10:19 PM on the last day of that period, Petitioner Dan Carson filed the instant Verified Petition for Writ of Mandate ("Petition"), challenging multiple statements in the Argument Against Measure H. (Pet., ¶ 8.) The Petition contended that all of the challenged statements were either false or misleading, and requested that this Court issue a writ of mandate to amend Real Parties' ballot argument to delete these statements in their entirety. (Pet., pp. 8-9.) The Petition challenged statements regarding DiSC 2022's compliance with the General Plan, with its supposed commitments to reduce traffic impacts, and with its greenhouse gas emissions.

Real Parties were not contacted by Petitioner's counsel until March 23, only two days ahead of a scheduled court hearing on Friday, March 25. (Declaration of Alan Pryor, dated April 5, 2022 ("2d Pryor Decl."), ¶ 2.) Real Parties began frantically seeking law firms, contacting local attorneys,

[1] Real Parties seek fees *only* against Petitioner Dan Carson, not against Respondents in this action.

searching for local counsel with expertise in election law litigation, and gradually expanding the search further afield. (Declaration of Colin Walsh, ("Walsh Decl."), ¶¶ 3-8.) After receiving more than 6 rejections from firms located in Davis, Sacramento and the Bay Area, only one firm, Los Angeles-based Strumwasser & Woocher, was willing to take the case and offered a discounted rate that Real Parties could afford. (*Id*., ¶¶ 8-11.) Strumwasser & Woocher was able to offer this reduced rate contingent on its ability to seek a fully compensatory award of fees pursuant to Code of Civil Procedure section 1021.5 if it was able to successfully defend the challenged statements. (Declaration of Beverly Grossman Palmer ("Palmer Decl."), ¶ 2.) Real Parties emptied the group's bank account to pay the retainer and have not spent a penny since. (2d Pryor Decl., ¶¶ 4, 9.)

Due to ballot printing deadlines, Real Parties were required to respond to the Petition in an expedited manner, filing their Opposition to Petition for Peremptory Writ of Mandate on Monday, March 28, only 4 days after being retained. Responding to the Petition required an understanding of and familiarity with the land use, general plan, environmental, and other documents relied upon in the Petition to support the allegations that the statements were false and misleading. Together, Real Parties' attorneys worked under the tight time frame to respond thoroughly to each and every one of Petitioner's challenges, providing two declarations and seeking judicial notice of 10 separate documents, including excerpts of the Davis General Plan, the Addendum to the Environmental Impact Report (DiSC 2022 Addendum), and a staff report to City Council, as well as other government documents. (See Palmer Decl., Exh. A [billing records].) Relying upon these documents, Real Parties briefed (Opp., p. 6) the difference between aspects of the project contained in "Baseline Project Features" and those incorporated into the Development Agreement, explained how the term "unmitigated" referred to Real Parties' opinion regarding the future greenhouse gas emissions from DiSC 2022 (*id*., p. 14), and walked through the various documents confirming multiple emissions-related "significant and unavoidable impacts" (*id*., p. 15, quoting Maltbie Decl., Exh. B, pp. 7-8).

The Petition for Peremptory Writ of Mandate came before this Court on March 29, 2022, and the Court issued its ruling on March 30, 2022. The Court outright rejected three of Petitioner's challenges and adopted Real Parties' suggestions for the two modest edits it ordered. For example, during the hearing, the Court focused on Petitioner's argument that the statement "their only promise

is to develop a Traffic Demand Management Plan if the project is approved" is false and misleading, raising a point not raised by Petitioner himself: that using the word "only" effectively denies the existence of other traffic-related commitments in the *Baseline Project Features*.[2] After the hearing, Real Parties immediately sought leave of court to file a supplemental post-hearing response, offering a revision to address the Court's apparent concern about the use of the term "only" while retaining the overall structure and sense of Real Parties' ballot argument: "~~Their~~ They ~~only~~ promise ~~is~~ to develop a Traffic Demand Management Plan if the project is approved." (Real Parties' Post-Hearing Response, p. 2.) The Court's statement of decision adopts precisely this suggestion. (Order, p. 3.)

Likewise, during the hearing, the Court found Petitioner's challenge to Real Parties' statement that "DiSC is projected to produce 54 million pounds of new greenhouse gases annually" to be "fairly straightforward" (Hearing Transcript ("HT")[3] 11:19-20, 12:11-12) and zeroed in on whether Petitioner would agree with Real Parties' suggestion to "use the metric ton figure" (HT 11:22-23), referring to Real Parties' statement that they would not oppose replacing "54 million pounds" with "20,000 metric tons." (Real Parties' Opposition Brief ("Opp. Br."), p. 18, fn. 9.) Importantly, the Court stated Real Parties' declaration—explaining the difference between Avoirdupois pounds, Troy pounds, and the unforeseen perils of online conversion calculators—was "very persuasive and illuminating to me" (HT 37:1) and the Court's order made a point to note that Real Parties' use of the less common unit of weight "was made inadvertently and not in bad faith" (Order, p. 4).

Because Real Parties presented a thorough analysis rebutting each of Petitioner's challenged statements, Real Parties' counsel was required to expend significant hours preparing the briefs in this matter. Real Parties' counsel's hours and detailed timesheets are set forth in the concurrently filed Declaration of Beverly Grossman Palmer, along with supporting information regarding the reasonableness of the claimed rates. Real Parties' records reflect 70.7 hours on the merits and 30.9 hours on the fee motion; along with estimated fees on Reply in the amount of $9,000, the total fee award requested is $70,333, along with $1,155.85 in costs.

[2] Petitioner's brief (pp. 5-6) argued only that the project applicant was required to create and implement other traffic mitigation obligations stated in the Development Agreement and the DiSC 2022 Mitigation Monitoring and Reporting Program.

[3] A copy of the transcript of this Court's hearing on March 29, 2022 is attached as Exhibit N to the Palmer Declaration.

ARGUMENT

I. REAL PARTIES FULLY SATISFY THE STATUTORY CRITERIA FOR AN AWARD OF FEES PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1021.5.

Real Parties satisfy all the statutory criteria set forth in Code of Civil Procedure section 1021.5 for an award of attorneys' fees: (1) they were the "successful party" in an action that "has resulted in the enforcement of an important right affecting the public interest;" (2) "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons;" and (3) "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." (Code Civ. Proc., § 1021.5.)[4] Recognizing that such rights may be enforced not only by plaintiffs but by defendants acting as private attorneys general to enforce the laws, the Legislature made no distinction among the parties to a lawsuit for purposes of attorneys' fee awards under Code of Civil Procedure section 1021.5. (*County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 869.) In enacting section 1021.5, the Legislature intended to encourage meritorious defense of lawsuits that, like the present case, seek to undermine the exercise of an important constitutional right to the detriment of the public.

California courts have long recognized the fundamental importance of free speech in our democratic society, particularly in the context of political debate. (See, e.g. *Kaufman v. Federal Savings & Loan Association* (1983) 140 Cal.App.3d 913, 919 ["If the First Amendment stands for anything at all, it guarantees that debates on political issues of the day will remain uninhibited, robust and wide open."].) Courts therefore have consistently made substantial fee awards to parties who defend the exercise of this constitutional right, thereby providing the public with the "uninhibited, robust and wide open" political debate contemplated and encouraged by the First Amendment.

In *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, for instance — a case that is similar to the instant litigation — the Court of Appeal found that the trial court had abused its discretion by not awarding fees under section 1021.5 to real parties in interest who had successfully defended their ballot arguments against legal challenge. In that case, the petitioners sought to have 18 separate statements stricken from real parties' ballot argument. The trial court rejected 14 of petitioners' claims and

[4] The final factor under section 1021.5—whether such fees should be paid out of the recovery, if any—is inapplicable here, since Real Parties had no monetary recovery. (*Press v. Lucky Stores, Inc*. ("*Press*") (1983) 34 Cal.3d 311, 318, fn. 5.)

ordered relatively minor wording changes in the remaining four statements. Following the trial court's ruling, both sides claimed victory and sought attorneys' fees and costs under section 1021.5. The trial court denied both motions, ruling that "[n]o significant benefit was conferred by anybody," and stating that it "did not think an important public policy was vindicated in this particular case." (*Id*. at p. 1766.)

The Court of Appeal reversed, agreeing with the authors that "the overwhelming result of the litigation was to reject respondents' efforts at censorship and vindicate appellants' rights to present, and the public's right to receive, information and argument concerning two controversial ballot initiatives" (*id.* at p. 1768) and held that real parties-appellants had "fully satisfied" the elements for a fee award under section 1021.5" (*id.* at p. 1767).

So too here. Real Parties' victory in this action not only vindicated their own First Amendment right to participate in the public debate by presenting information and arguments against Measure H, it also upheld the *public's* interest in *receiving* "a full, uncensored ballot argument," which will aid the electorate in deciding whether to vote for or against Measure H.

A. Real Parties Were the "Successful Party" in This Action.

"The term 'successful party,' as ordinarily understood, means the party to litigation that achieves its objectives." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 571 ("*Graham*").) Having defended against Petitioner's attempt to re-write their Argument Against Measure H in ways that would obfuscate or dilute their main points, Real Parties are a "successful party."

The Supreme Court takes a "broad, pragmatic view of what constitutes a 'successful party.'" (*Id.* at p. 565.) A party is "successful" if they "succeed on *any* significant issue in the litigation which achieves *some* of the benefit the parties sought in bringing suit." (*Bowman v City of Berkeley* (2005) 131 Cal.App.4th 173, 177; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153.) A party need not prevail on *every* claim to be entitled to an award of attorney fees. (*Sweetwater Union High Sch. Dist. v Julian Union Elementary Sch. Dist.* (2019) 36 Cal.App.5th 970, 982.)

Here, the "overwhelming result of the litigation was to reject [Petitioner's] efforts at censorship and vindicate [Real Parties'] rights to present, and the public's right to receive, information and argument concerning [Measure H] .... In defending the action, they achieved a victory that was substantial and which qualifies [Real Parties] as prevailing parties under section 1021.5." (*Hull*, 13

Cal.App.4th at p. 1768.) Real Parties' goal was to defend their Argument Against Measure H against Petitioner's attempts to obfuscate or dilute their key points, an objective that Real Parties successfully achieved. (Pryor 2d Decl., ¶¶ 5-6.) Real Parties were successful in the action because the Court did not strike statements Petitioner sought to have excised; rather, in only two instances, adopted *Real Parties*' suggestions for wording changes that preserved the intent of the argument's authors.

Comparing the Petition for Writ of Mandate with the Court's Order highlights the success of Real Parties' defense. The Petition stated "the court must delete the words 'and it is still non-compliant with the City of Davis General Plan.'" (Pet., ¶ 22.) Echoing Real Parties' arguments (Opp. Br., pp. 9-11), the Court denied Petitioner's request (Order, p. 2). The Petition also demanded the court "delete the term 'Unmitigated'" to describe DiSC 2022's future GHG emissions. (¶ 24.) Again, echoing Real Parties' arguments (Opp. Br., pp. 14-16; HT 31-33), the Court left Real Parties' speech unchanged (Order, p. 4). Petitioner also asserted that the court "must delete the words 'no binding commitments,'" in the discussion of traffic measures (Pet., ¶ 23), a result this Court declined because the statement was qualified by the word "almost," rendering the statement an opinion (Order, p. 3).

Even where the Court did amend the ballot language, it denied Petitioner's broad deletion demands and ordered only the two surgical changes *Real Parties* requested. The Petition sought the deletion of *the entire sentence* 'Their only promise is to develop a Traffic Demand Management Plan if the project is approved'" (¶ 23, emphasis added), but the Court "excise[d] the word 'only'" (*id*., p. 3) as *Real Parties* requested—instead of "delet[ing]" the entire sentence. (¶ 23).

As to the Court's adoption of Real Parties' suggestion to replace "54 million pounds" of GHG emissions with "20,000 metric tons" (Order, p. 4), that too displays how Real Parties prevailed over Petitioner's request to delete *two whole sentences*[5] because they were allegedly "misleading when taken out of the context of the underlying entitlement documents" (Pet., ¶ 25). Rather than preventing Real Parties' speech or altering its meaning as Petitioner requested, the Court allowed Real Parties to present information and argument concerning Measure H *exactly how Real Parties sought to*.

In short, Real Parties were able to convey all the points they sought to make in their argument.

[5] The Petition (¶ 25) identifies the following lines: "Yet alarmingly, the Environmental Impact Report states ***DiSC is projected to produce 54 million pounds of new greenhouse gas emissions annually*** – largely from vehicle emissions. DiSC alone will **increase the City's carbon footprint by almost 5%,** completely derailing the City's ability to meet its carbon-neutral goal by 2040."

Real Parties were successful and meet this requirements for an award of fees under section 1021.5.

B. Real Parties Enforced "Important Rights Affecting the Public Interest," and Thereby Conferred a "Significant Benefit" on the General Public.

Real Parties' defense of their Argument Against Measure H "enforced not only their constitutional right to communicate vital information about their views and positions to voters, but also [Davis] voters' constitutional right to receive information essential to thoughtful decisionmaking and democratic self-government." (*Sandlin v. McLaughlin* (2020) 50 Cal.App.5th 805, 830 [successful defense of challenge to candidate statements enforced important right and conferred significant public benefit].) The "***unfettered interchange of ideas***" is "at the heart of the First Amendment" so "speech which arises directly from political debates . . . is entitled to greater protection." (*Kaufman*, 140 Cal.App.3d at p. 919, emphasis added.) In addition, in Davis, Measure J is intended to promote "direct citizen participation in land use decisions affecting city policies for compact urban form, agricultural land preservation, and an adequate housing supply," by establishing a right to vote on certain projects. (Davis Municipal Code, § 41.01.010 (a)(1).)[6] Real Party's defense enforced important statutory and constitutional rights for the benefit of the citizens of Davis.

The importance of providing the public with an open political debate is what led the court in *Hull v. Rossi* to find that real parties had enforced important rights affecting the public interest and had conferred a significant benefit on the general public by successfully defending various statements in their ballot argument against the petitioners' attacks. (13 Cal.App.4th at pp. 1767-1768.) Likewise, in *Hammond v. Agran* (2002) 99 Cal.App.4th 115, the court had "no doubt" that a candidate's successful defense of a challenge to his candidate statement in the voter pamphlet enforced "an important right affecting the public interest" and conferred "a significant benefit ... on the general public or a large class of persons." (*Hammond*, 99 Cal.App.4th at p. 121.) Even after a measure has been voted upon, having full and complete ballot arguments continues to serve the public interest because they "are accepted sources from which [courts] ascertain the voters' intent and understanding of initiative measures." (*Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, 585.)

In this case, had Petitioner's writ petition succeeded, it would have deprived local voters of

[6] These provisions are at Exhibit 3 to the March 28 Declaration of Beverly Grossman Palmer and Request for Judicial Notice.

critical information about DiSC 2022 — that DiSC 2022 is inconsistent with the General Plan, that there are "almost no binding commitments" to improve the traffic mess, that the Traffic Demand Management Plan is a vague "promise," not an actionable *plan*, and that the DiSC will increase the City's carbon footprint and derail the City's ability to meet its carbon-neutral goal by 2040. (Pet., ¶¶ 23, 25 [urging the Court to "delete the words 'no binding commitments' and the sentence 'Their only promise is to develop a Traffic Demand Management Plan if the project is approved'" and claiming that statement regarding the City's 2040 goal is false and misleading].) Instead, as a result of Real Parties' defense against Petitioner's challenges in this action, the Argument Against Measure H will be submitted to the public precisely as Real Parties have chosen, vindicating Real Parties' First Amendment rights to express their views on controversial measures, and their statutory rights under the Elections Code to have those opinions that are not false or misleading included in the official ballot pamphlet. Real Parties' defense also conferred a significant benefit on *all* voters in Davis by ensuring that they were provided an "uninhibited, robust and wide open" political debate on the merits of Measure H as required by the First Amendment. (*Kaufman*, 140 Cal.App.3d at p. 919.)

C. The Necessity and Financial Burden of Private Enforcement Make a Fee Award Appropriate in This Case.

The instant litigation also satisfies the final requirement of section 1021.5 because "the necessity and financial burden of private enforcement are such as to make the award appropriate." (Code Civ. Proc.,§ 1021.5.) Real Parties did not initiate or participate in this litigation voluntarily: they were named parties and therefore were forced to defend the validity of the challenged ballot arguments. (See Elections Code,§ 9295, subd. (b)(3) [requiring "the person or official who authored the material in question ... be named as real parties in interest"].) Having been dragged into court by Petitioner, Real Parties had no other choice but to retain counsel and fully participate in the litigation in which they were named parties. "A prospective private attorney general should not have to rely on the prospect that the court will do the right thing without opposition." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1301.)

Real Parties also meet the requirement that the financial burden of enforcement exceeds their personal interest in the action. The "financial interest" prong involves a balancing of the financial burdens involved in litigation against the expected financial benefit the lawsuit "could have been

expected to yield." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215.) "An award is appropriate when the cost of the claimant's legal victory transcends his or her personal interest."(*Washburn,* 195 Cal.App.3d at p. 584.) Here, Real Parties, authors of the Argument Against Measure H, had no pecuniary interest in the outcome of this litigation. Logically, Real Parties cannot have expected to gain financially from having the Argument Against Measure H appear in their preferred form in the ballot pamphlet. (See, e.g., *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 230 [any potential financial benefit that could result from a vote on a ballot measure is "at least once removed from the results of the litigation" over a campaign finance question].) *Real Parties' interest in this action was primarily to preserve the First Amendment right to full and free speech in the ballot pamphlet, and, in the exercise of that right, presenting theirs and others opinions on an issue of significant local controversy.* Real Parties had no expected monetary award from this litigation, so the financial burden exceeded any potential financial gain.

II. THE REQUESTED FEE AWARD IS REASONABLE.

The amount of a fee award under section 1021.5 is determined according to the "lodestar adjustment" methodology set forth by the California Supreme Court, i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. (See *Serrano v. Priest* ("*Serrano III*") (1977) 20 Cal.3d 25, 48-49.) The lodestar includes out-of-pocket expenses of the type normally billed to fee-paying clients. (Code Civ. Proc., § 1033.5, subd. (c)(4).) The lodestar may then be increased by "the application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit." (*Press*, 34 Cal.3d at p. 322 & fn. 12.)[7]

A. The Time for Which Fees Are Requested Was Necessarily and Reasonably Spent.

The hours counsel billed were reasonably and efficiently spent. The California Supreme Court has held that attorneys' fees recoverable under section 1021.5 should "include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." (*Serrano v. Unruh* ("*Serrano IV*") (1982) 32 Cal.3d 621, 639 [emphasis added].) "It must be remembered that an award of attorneys' fees is not a gift." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1304.) "It is just compensation for expenses actually incurred in vindicating a public right." (*Ibid*.)

[7] While the partially contingent nature of this representation would justify a request for a multiplier, Real Parties forego this request and seek only their reasonably incurred fees at a reasonable rate (which is itself reduced from the full commercial rate Real Parties' counsel commands).

As the Palmer Declaration attests, and as the time records confirm, counsels' handling of this case was competent and efficient due to the skill and experience of the lead attorney, Beverly Grossman Palmer, who has significant experience litigating challenges to ballot statements and extensive experience in environmental, municipal, and land use law. To ensure maximum efficiency, Ms. Palmer delegated to an associate, Julia Michel, significant research and drafting tasks. There was little task overlap among counsel, and the firm took advantage of differing levels of experience and expertise to reduce the fees incurred wherever possible. (See Palmer Decl.,¶ 8 & Exh. A.)

Finally, Real Parties exercised substantial discretion in reviewing the hours spent and removing from the fee request time that arguably did not effectively further the prosecution of the case. (Palmer Decl., ¶ 11.)[8] The hours and fees that Real Parties have included in this request are more than reasonable and should be fully compensated.

B. Real Parties Achieved in Full Their Litigation Objectives So a Full Award is Appropriate.

The fact that the judgment provides that the writ is granted "in part," is no basis to reduce in any way the amount of fees awarded to Real Parties, who met their primary objective: articulate the Argument Against Measure H *themselves*, not as Petitioner Carson dictated. This case therefore should not be analyzed under the framework for "limited success," set forth in *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2010) 190 Cal.App.4th 217, 238-239 ("*EPIC*"), and *Hensley v. Eckerhart* (1983) 461 U.S. 424.

Even if that framework were applied, it would not require any reduction. "The first step inquiry is to determine whether the prevailing party's unsuccessful claims are related to its successful ones." (*EPIC*, 190 Cal.App.4th at p. 239.) In this case, Petitioner advanced only one legal claim and only a single cause of action: the Argument Against Measure H was false and misleading. (Pet., p. 8.) If claims arise from "a common core of facts" or are "based on related legal theories" then they are related. (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 423, internal citations omitted.) Under this standard, everything in this litigation was related because all of the claims involved a common core of facts about the effects of DiSC 2022 and the manner in which the Argument Against Measure H described that measure for the voting public. That Petitioner contended

[8] The Motion does not include any charge for the development of the PowerPoint presentation utilized during the March 29 hearing, as this was provided at no charge by a supporter of No on DiSC.

the Argument Against Measure H contained multiple alleged misrepresentations does not render each alleged misrepresentation "unrelated." (E.g., *Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396, 408 [claims involved common set of facts and intertwined legal theories where plaintiffs alleged car dealer made multiple false representations about different specific features of a car].) Moreover, much like *EPIC*, this case concerned multiple challenges to ballot argument, each one supported by "documents that are to some degree interrelated with the others." (190 Cal.App.4th at p. 247.) Because the claims are related,[9] the second step of the inquiry is to determine "whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." (*EPIC*, 190 Cal.App.4th at p. 239.) The court must "evaluate the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." (*Ibid.*) "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation. . . . In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." (*Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1674, quoting *Hensley*, 461 U.S. pp. 435–436.) Indeed, courts have held that it is *only* when a plaintiff has achieved "limited success or has failed with respect to *distinct* and *unrelated* claims," is a reduction from the lodestar warranted. (*Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1369, emphasis added; see also *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250.) One court has noted that "[t]o reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney . . . who pays the costs of enforcing" the rights. (*Wysinger v. Automobile Club of Southern*

[9] Even if the Court concludes that each of Petitioner's challenges were unrelated, work on the challenges that did result in slight modifications to the Argument Against Measure C was so interrelated to Real Parties' successful defenses that it would either be impossible to segregate it, or so de minimis that allocation is unnecessary. (Palmer Decl., ¶ 9.) For example, all of the arguments regarding traffic required consulting the same documents and were addressed in the same section of the Opposition Brief. (Opp. Br., pp. 11-14.) Likewise, Petitioner's challenge to the prediction that the DiSC 2022 would result in "54 million pounds" of GHG emissions was enmeshed with Petitioner's (unsuccessful) challenge to the use of the word "unmitigated" to describe GHG emissions. (Pet. Br. p. 8.) In such situations, no allocation to unrelated claims is required. (*Hoffman v Superior Ready Mix Concrete, L.P.* (2018) 30 Cal.App.5th 474, 488; *Cordero-Sacks v Housing Auth.* (2011) 200 Cal.App.4th 1267, 1285; *Liton Gen. Eng'g Contractor, Inc. v. United Pac. Ins.* (1993) 16 Cal.App.4th 577, 588.)

California (2007) 157 Cal.App.4th 413, 431 [affirming denial of request to reduce fees because age and disability discrimination claims were based on facts common to all causes of action and sufficiently related], quoting *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273, 237.)

There is no basis under the second prong to reduce any hours claimed by Real Parties. In fact, had Petitioner sought to discuss these terms with Real Parties at any point prior to instituting litigation, Real Parties would have *voluntarily* instituted the two miniscule Court-ordered changes. (2d Pryor Decl., ¶ 10.) That is, the amount of fees was "increased by [Petitioner's] own conduct" (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 627), for one "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by [Real Parties] in response" (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 638).

Moreover, Real Parties obtained in full the ultimate relief they hoped for: a court order protecting their right to explain, in their own words, what they view as the biggest reasons to vote against approval of DiSC 2022 as well as confirming, for the record, that Real Parties' 54 million pound figure was inadvertent and never intended to mislead. (See Pryor 2d Decl., ¶ 7; Order, p. 4.) Again, the Court rejected Petitioner's challenges to each of these big-picture issues and did not require Real Parties, for example, to strike their characterization of developer's traffic mitigation as a mere "promise" or insert additional text stating that DiSC 2022 would generate "up to" 20,000 metric tons of GHG emissions, as Petitioner's brief implied. (Pet. Br., p. 8 [criticizing "any use" of the 20,000 metric ton number because it "presents a worst case scenario"].) In short, Real Parties were fully successful, and their attorneys should be fully compensated for their time.

C. The Rates Requested Are Equivalent to Those Charged by Attorneys with Comparable Experience and Knowledge.

Under *Serrano III*, after calculating the time reasonably spent, the Court must multiply each attorney's hours by a reasonable hourly rate of compensation. This rate is not dependent on the rates the attorneys actually charged the clients, if fees were charged at all: "Services compensable under section 1021.5 are computed from their reasonable market value." (*Serrano IV*, 32 Cal.3d at p. 643.)

The "reasonable market value" of the attorneys' services is determined by reference to the "prevailing billing rates of comparable private attorneys." (*Id*., at pp. 640, 643 & fn. 31; see also *San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 755

[attorneys who charged below-market rates were entitled to full market rates in fee award; court "obliged to use the 'market value' approach" because it "is more likely to entice competent counsel to undertake difficult public interest cases"].) Counsel's rates are reasonable if they are within the range of rates charged by private attorneys of similar skill, reputation, and experience for comparable litigation. (E.g., *Church of Scientology of California v. Wollersheim* (1996) 42 Cal.App.4th 628, 659.)

Though a lodestar is typically calculated using *local* hourly rates, "[w]hen a plaintiff needs to hire out-of-town counsel, a trial court must consider *counsel's* 'home market rate' when setting the hourly rate, rather than the local market rate." (*Caldera v. Department of Corrections and Rehabilitation* (2020) 48 Cal.App.5th 601, 609, emphasis original.) This threshold showing is "not onerous" as *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603 illustrates. In that case, the Court of Appeal reversed the trial court's determination that local rates must apply where the only evidence before the trial court on the issue was a declaration stating that plaintiff was familiar with the local market and that no local attorney who regularly practiced on behalf of environmental groups was available to work on a contingent basis and possessed sufficient expertise to represent the plaintiffs. (*Id*. at p. 618.) Rejecting the argument that this evidence was insufficient, the Court reiterated that the "threshold showing of impracticability … is not onerous" and that the declaration provided "sufficient and competent evidence that plaintiffs acted in good faith and hiring qualified counsel in the San Bernardino area was impracticable." (*Id*. at p. 618; accord *Caldera*, 48 Cal.App.5th at pp. 610-611 [trial court abused its discretion by reducing Los Angeles rates for when undisputed evidence showed the plaintiff was unable to find local counsel]; *EPIC*, 190 Cal.App.4th at p. 249 [must make "good faith effort to find local counsel"].)

Real Parties here demonstrated a good faith effort to find local counsel but, as demonstrated by the Walsh Declaration, hiring local counsel was simply impracticable because they either had a conflict, were too busy, did not have the required expertise and experience, or otherwise declined to represent Real Parties. (Walsh Decl., ¶¶ 6-16.) Real Parties contacted several attorneys in the Davis area, but none who possessed sufficient expertise to represent Real Parties in this litigation were willing to represent them on such a reduced rate basis and under such a compressed schedule. (*Ibid.*)

Hence, the applicable rates are as listed in the Palmer Declaration, and their reasonableness is

fully explained and documented therein, including citations to recent surveys of billing rates charged by firms and attorneys in the Los Angeles area of comparable skill and experience. (Palmer Decl., ¶¶ 20-23 and Exhs. C-M.) In fact, the standard rates that Real Parties' attorneys charge their fee-paying commercial clients are in most instances consistent with the rates charged by other Southern California-based attorneys with equivalent litigation experience and expertise. (*Ibid*.; see *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 82 [counsel entitled to rates of "top law firms in the Bay Area"].) ***Yet the rates requested in this motion are even lower than those standard rates.*** As an experienced election law, administrative law, and land use attorney, Ms. Palmer commands billing rates comparable to those charged by experienced attorneys in the state's most prestigious law firms. The rates the firm charges are reasonable for their qualifications and for the excellent results they consistently receive for their clients, as their success in this case demonstrates.

III. REAL PARTIES ARE ENTITLED TO RECOVER OUT-OF-POCKET EXPENSES

Parties entitled to recover their attorneys' fees pursuant to a fee-shifting statute are also entitled to recover their reasonable litigation-related out-of-pocket expenses, as long as no statute expressly precludes their recovery (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d, 1407, 1419) and they are "reasonably necessary and reasonable in amount." (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1149). The expenses Real Parties claim are documented in the exhibits attached to the accompanying Palmer Declaration, and meet this standard. (See Palmer Decl., ¶ 24, Exh. B.) In addition, attorney Michael Harrington paid for a court reporter and transcript on behalf of Real Party Pryor, and this cost, which is requested to be awarded directly to Mr. Harrington, is documented in his concurrently filed declaration. (Declaration of Michael Harrington, Exh. 1.)

CONCLUSION

Real Parties' request for attorneys' fees is summarized at the Palmer Declaration, paragraph 26, and reflects $44,390.50 on the merits, $16,942.50 on the fee motion (along with an estimated $9,000 for reply), and $110.09 in costs, along with the $1045.76 in costs incurred by Mr. Harrington. The total request is $71,488.85. As Real Parties satisfy the requirements of section 1021.5, and are entitled to a fully compensatory award, they respectfully request that the Court grant this motion in full.

DATED: April 7, 2022

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