SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF YOLO

DAN CARSON

Petitioner,

vs.

ZOE S. MIRABILE, in her official capacity DAVIS CITY CLERK, and JESSE SALINAS, in his official capacity as YOLO COUNTY ASSESSOR/CLERK RECORDER/REGISTRAR OF VOTERS

Respondents.

ALAN PRYOR, an individual; MICHAEL CORBETT, an individual; STEPHEN WHEELER, an individual; DARREL DICKEY, an individual; JULIETTE BECK, an individual; and ROBERTA MILLSTEIN, an individual,

Real Parties in Interest.

Case No. CV 2022-0451

ORDER AFTER HEARING (ATTORNEYS' FEES AND COSTS UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5)

On May 11, 2022, the court heard argument on competing motions for attorneys' fees[1] brought under Code of Civil Procedure section 1021.5, California's codification of the "private attorney general doctrine." At the conclusion of the hearing, the court took the matter under submission.

As explained below, while both sides gained some of their objectives in this litigation, the Real Parties in Interest have achieved the greater share of success, and are awarded a net fees recovery of $42,209.75.

1. Factual Background

This case concerns Measure H, a City of Davis ballot measure that would authorize a development project known as the "Davis Innovation and Sustainability Campus," or "DiSC 2022." The Davis City Council approved the necessary entitlements for the project, but because it would require a change in the City's General Plan, the voters must also approve it.

The project will be considered on the June 7, 2022 ballot, and arguments for it and against it have been submitted. Such arguments are especially important, because they appear in the *Voter Information Guide,* and therefore have an official imprimatur.

As allowed by Elections Code section 9295, Petitioner Dan Carson filed a legal challenge to the accuracy of some of the statements made in the *Argument Against Measure H.* He named the Davis City Clerk and the Yolo County Assessor/Clerk/Recorder/Registrar of Voters as respondents, but their participation is nominal, as they neither support nor oppose his challenge, but simply stand ready to follow the court's orders.

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[1] Real Parties in Interest also seek recovery of costs, but as explained below, this request is denied without prejudice for failure to comply with the applicable Rule of Court.

Petitioner Carson also named six individuals as the "Real Parties in Interest." These individuals signed the *Argument Against Measure H*, and defended it in court against his challenge.

Petitioner Carson challenged five separate provisions of the ballot argument, and the court ruled in his favor on one, granted him partial relief on another, and ruled against him on the other three.

Both sides now seek attorneys' fees under Code of Civil Procedure section 1021.5, the private attorney general doctrine.

2. An Overview of the Private Attorney General Doctrine

Under the "American Rule," litigants in this country generally pay their own lawyers, win or lose. In contrast, under the "English Rule," the loser pays both lawyers. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1143-1144.)

There are exceptions to the American Rule, and one is the private attorney general doctrine. Its purpose is to encourage "meritorious public interest litigation vindicating important rights." (*Early v. Becerra* (2021) 60 Cal.App.5th 726, 736.)

The private attorney general doctrine accomplishes this purpose by awarding attorneys' fees to litigants who advance the public interest by successfully bringing or defending a lawsuit. (*Ibid.*) The aim is to incentivize legitimate public interest litigation, not to punish the losing side. (*Ibid.*) Without the prospect of a fee award, litigants may be unable or unwilling to undertake or defend litigation that transcends their own private interest, even when doing so would benefit a "a broad swath of citizens." (*Ibid.*)

3. Analysis of the Statutory Criteria for an Award

The private attorney general doctrine is codified in Code of Civil Procedure section 1021.5, which states in relevant part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (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 other public entity, are such as to make the award appropriate . . .

(Code Civ. Proc., § 1021.5.)

Based on this statute and the appellate cases interpreting it, these are the requirements for a fee award under the private attorney general doctrine:

1. That the party seeking the fee award is "a successful party" (see ¶ 3.1 below);
2. That the party's litigation efforts resulted in "the enforcement of an important right affecting the public interest" (see ¶ 3.2 below);
3. That the party's litigation efforts have provided a "significant benefit" to the "general public or a large class of persons" (see ¶ 3.3 below);
4. That granting a fee award is "appropriate" based on the "necessity and financial burden of private enforcement" (see ¶ 3.4 below); and
5. That the fees sought are reasonable (see ¶ 3.5 below).

After analyzing each of these requirements for a fee award, the court will address a novel question presented by this case: can both sides receive a fee award, if both achieved some success in the litigation, and both are otherwise eligible? (See ¶ 4 below).

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Finally, the court will make fee awards, taking into account the degree of success enjoyed by each side. (See ¶ 5 below). The awards offset each other, leaving the Real Parties in Interest with a net recovery.

3.1. ***Who is the "Successful Party?"***

This question has two parts:

- What is the standard for determining success in litigation?
- Applying that standard, who is the "successful party" in this case?

3.1.1. What is the Standard for Determining Success in Litigation?

For those bringing a lawsuit, like Petitioner Carson, the standard is clear: "a plaintiff [or petitioner] may be deemed to have been successful under section 1021.5 by succeeding on any significant issue in the litigation which achieves some of the benefit plaintiff sought in bringing suit." (*Hall v. Department of Motor Vehicles* (2018) 26 Cal.App.5th 182, 190; see also *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433 [seminal case on "any significant issue" standard].) This is a lenient standard, because it only requires the plaintiff or petitioner to show that it won "on any significant issue."

This lenient standard for success is illustrated in the case of *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 177, where a group of neighbors sued the City of Berkeley over its approval of a housing project. They brought six separate challenges to the project, and lost on all but one. The Court of Appeal concluded that "[t]here is no question that the [neighbors'] case was largely unsuccessful." (*Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 177.)

Even though they were "largely unsuccessful," the Court of Appeal in *Bowman* still found the neighbors to be fee-eligible "successful parties" under the private attorney general doctrine because they prevailed on one of their claims. For those bringing suit, a little success is enough. (See *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578 [affirming fee award for plaintiffs when they brought litigation changing ballot language, even though they prevailed on less than half of their challenges].)

What is the standard for those defending a lawsuit, like the Real Parties in Interest here? Do they benefit from the same "any significant issue" standard, or must they clear a higher hurdle?

The court has found no precedent clearly answering this question.

In *Hull v Rossi* (1993) 13 Cal.App.4th 1763, a leading case on fee awards for those defending ballot statements, the appellate court did not address the question. In that case, the proponents of a ballot measure successfully fended off a challenge to their argument, with the court only making "minor" and "inconsequential" changes. The trial court awarded fees based on the successful defense, and the appellate court affirmed. But the *Hull* court did not articulate the standard for determining success for defendants, likely because only one side achieved any measure of victory in that case.

While neither *Hull* nor any other published California case (to this court's knowledge) has clearly answered the question, this court concludes that the same standard for determining "successful party" status applies to those bringing lawsuits and those defending them.

Section 1021.5 itself "draws no distinctions" between plaintiffs and defendants, and there is no apparent reason to use a different measuring stick for those prosecuting a lawsuit and those defending it. (See *Hull v. Rossi* (1993) 17 Cal.App.4th 1763, 1768; *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 878, 869.)

Thus, to be deemed a "successful party," neither Petitioner nor the Real Parties in Interest need to show total victory. Instead, each side need only show that they prevailed on "any significant issue.

3.1.2. ***Applying the "Any Significant Issue" Standard, Who is the "Successful Party" in this Case?***

At the outset, it is important to note that there was not ***one*** battle here, but ***five***, since each of the challenged provisions were separately analyzed. Each statement stood or fell on its own – the fact that one statement was found true (or arguable), did not make it any more or less likely that the next would pass muster.

The quantitative tally is one victory for Petitioner, three for Real Parties in Interest, and one split decision. The qualitative results generally align with the quantitative tally, as explained below.

- ***"[A]nd is still non-compliant with the City of Davis General Plan."***

The Court let this provision stand without change, and noted that both sides agreed that DiSC 2022 requires a change to the General Plan. The Petitioner's argument was that the necessary amendment to the General Plan was included in Measure H – a true point – but Real Parties in Interest nonetheless clearly prevailed with respect to this challenge.

- ***"The Developer had made almost no binding commitments and has no viable ways to improve this traffic mess."***

While the truth of this statement is debatable, the Court let it stand for lack of "clear and convincing" evidence of its falsity. (Elec. Code, § 9295, subd. (b)(2).) This too was a victory for the Real Parties on an important substantive issue in the litigation, because the statement remained without editing. (A close win is a win.)

- ***"Their only promise is to develop a Traffic Demand Management Plan if the project is approved. But figuring this traffic mess out later is not a plan!"***

Petitioner sought to delete this entire sentence, but instead the court removed the word "only."

However, one word can be important, and in this case, deletion of the word "only" is a significant change. If the word had remained, voters may have felt no need to further research the traffic mitigation issue, based on the assurance that there was but one promise, when in fact there are more.

On the other hand, the rest of the sentence withstood the attack, and the Real Parties' primary argument -- that traffic mitigation details will be worked out later -- remains in their statement. The court thus finds a split decision on this challenge.

It is irrelevant that the Real Parties in Interest agreed to this amendment after the hearing, since ""voluntary' corrective action, induced by litigation, may properly be considered a 'benefit' of the litigation in determining the propriety of an attorney fee award." (*Northington v. Davis* (1979) 23 Cal.3d 955, 960 n. 2.) The Petitioner's lawsuit clearly caused the changes to the *Argument Against Measure H.*

- ***"Unmitigated Greenhouse Gas Emissions"***

The court found this heading ambiguous, and therefore let it stand. It is hard to know whether voters will place any great significance on the heading, but the Real Parties in Interest successfully defended against its removal and therefore prevailed on this claim.

- ***DiSC is projected to produce 54 million pounds of <u>new</u> greenhouse gases annually"***

The Petitioner prevailed on this challenge. Twenty-thousand metric tons (the amended value) is significantly less than 54 million avoirdupois pounds (the original value, as likely understood by voters). This is not the same mass or weight expressed in different units, but an actual change in value.

While the error was made in good faith, and while Real Parties in Interest promptly agreed to correct it upon notice, this was still a substantive victory for Petitioner. For some voters, 20,000 metric tons or 54 million pounds will both just be a considered a "big number." But accuracy does matter, and there may well be some detail-oriented voters for whom the exact value is significant. Petitioner's victory here is not trivial.

In sum, the litigation was not a complete win for either side, as both Petitioner and Real Parties in Interest scored substantive victories. Therefore, both sides easily satisfy the low bar of the "any significant issue" standard and qualify as successful parties.

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3.2. ***Has the Litigation Enforced an Important Right Affecting the Public Interest?***

Both Petitioner and Real Parties in Interest satisfy this requirement.

Petitioner's efforts have resulted in non-trivial, substantive amendments to the *Argument Against Measure H*, and those amendments serve the public's interest in receiving accurate information in the ballot pamphlet, thereby helping to ensure the integrity of the election process. The as-amended *Argument Against Measure H* is more accurate than the pre-amendment version, and these factual corrections serve the public interest. (See *Patterson v. Board of Supervisors* (1988) 202 Cal.App.3d 22, 30.)

The Real Parties in Interest also satisfy this requirement, as the public in a democracy has a strong interest in political debate that is "uninhibited, robust and wide open." (*Kaufman v. Fidelity Fed. Sav. & Loan* (1983) 140 Cal.App.3d 913, 919.) Our society has a deep commitment to free speech, especially in political matters, and by defending their right to make their argument in their words, the Real Parties in Interest have also enforced an important right affecting the public interest.

3.3. ***Has the Litigation Resulted in a Significant Benefit to the General Public or a Large Class of Persons?***

Both sides also satisfy this requirement. As noted above, the voting public has a strong interest in receiving ballot arguments that represent divergent viewpoints, *and* that are free of falsehoods. The voters of the City of Davis have benefitted from Petitioner's successful attempt to amend parts of the *Arguments Against Measure H,* and from the Real Parties in Interest's successful defense of the rest.

3.4. ***Is an Award Appropriate Based on the Necessity and Burden of Private Enforcement?***

As the California Supreme Court has explained, this requirement has two elements: (i) "whether private enforcement was necessary," and (ii) "whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214-1215.)

The first element is satisfied for both sides, as private enforcement and defense were necessary. There is no public agency that could have brought or defended this lawsuit.

The second element is also satisfied. Neither Petitioner nor Real Parties had any pecuniary or financial interest in the lawsuit. In both instances, the lawsuit was funded by the ballot measure committees, and neither of those committees has any pecuniary interest either.

Both the litigants and the ballot measure committees have *non-pecuniary* interests in the lawsuit – namely their opinions on the merits of the project – but the California Supreme Court has made clear that only pecuniary interests are considered for purposes of the analysis under the private attorney general doctrine. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211 ["[w]e conclude that a litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining fees under Code of Civil Procedure section 1021.5"].) A party does not need to be completely disinterested to obtain a fee award under the private attorney general doctrine – so long as it does not have a financial interest, it remains eligible.

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What about the financial interest of the project developers?

Of course they have one, and the Real Parties in Interest argue that developers' financial interest should be attributed to the Petitioner, and that the Petitioner's fee award request should be denied on this basis.

This argument fails for two reasons. First, the Real Parties in Interest do not cite legal precedent that would allow this court to attribute the financial interest of the ballot committee's donors to the Petitioner. The Real Parties in Interest cite *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, but in that the case the litigant's fees were paid by an "organization of trash hauler competitors." Here, in contrast, the funding comes through a ballot committee, which does not itself have a financial interest in the project. Some donors to the committee, namely the developers, undoubtedly do have such a financial interest, while others, such as citizens who support the project because they believe it benefits the City, do not. The court has not been presented with authority that would allow it to attribute the developers' financial interest to the Petitioner.

Second, the evidentiary record is too thin for the court to conclude that the developer is the "real" funder of this lawsuit. Besides a statement made during public comment at a city council meeting, no other evidence[2] concerning developer funding of the litigation has been introduced.

Thus, since neither Petitioner nor Real Parties in Interest had any financial incentive to bring this lawsuit, both sides satisfy this requirement.

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[2] For instance, no campaign donation data for *Yes on H* has been submitted.

3.5. Are the Fees Requested Reasonable?

The court finds that the rates and hours expended were reasonable for both Petitioner and Real Parties in Interest.

In analyzing the "reasonableness" of a fee request, the court starts with the "lodestar" amount, calculated as "the reasonable hours spent, multiplied by the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type." (*Ketchum v. Moses* (2001) 21 Cal4th 1122, 1133 [emphasis in original].)

The court finds that both Petitioner's counsel and Real Parties in Interest's counsel litigated the case with appropriate efficiency, and the court finds the hours spent to be reasonable. While the time spent in court was minimal, this litigation was hotly contested, and the subject matter presented a degree of both legal and factual complexity, necessitating significant out-of-court work.

The court also finds the rates to be reasonable for counsels' home market of Los Angeles. (Both sides hired counsel from that region of California.) Generally, fee awards are limited to the prevailing rate for "private attorneys in the community," and the rates at issue here are significantly higher than the prevailing rates in Yolo County or even Sacramento. (*Ketchum v. Moses* (2001) 21 Cal4th 1122, 1133.)

However, this case poses the special circumstance of extreme time pressure. The deadlines for an Elections Code section 9295 challenge are short, and neither Petitioner nor Real Parties in

Interest had much time for comparison shopping.[3] This is especially true for Real Parties in Interest, who describe in detail their hurried efforts to find counsel. Under such circumstances, the court finds it inappropriate to reduce the lodestar to reflect local prevailing rates.

Both sides seek "fees on fees," that is compensation for time litigating the fee award issue itself. Such an award is allowed under California law, and the court includes in its awards the hours spent litigating the fee issue. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 ["fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim"].)

Real Parties in Interest also seek recovery of costs, but that request is denied without prejudice for failure to file and serve a memorandum of costs, as required by California Rules of Court, rule 3.1700, subdivision (a)(1).

4. *Can Both Sides Receive a Fee Award?*

As explained above, both parties satisfy all the requirements for a fee award under the private attorney general doctrine. Does that mean both sides can receive a fee award?

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[3] Also, given the availability of remote appearance in Yolo Superior Court, counsel in Los Angeles could participate in hearings as easily as counsel situated in Yolo County.

While the court has found no published precedent on this precise question, a California treatise suggests that the answer is "yes":

> In litigation involving multiple claims, where plaintiff prevails on some and defendant on the others, § 1021.5 fees may be awarded to each party on the claim(s) for which it prevailed so long as each of those parties would otherwise qualify for a fee award.[4]

(Asimow, Strumwasser, Levy and Tuleja, The Rutter Group California Practice Guide – Administrative Law (2021), Ch. 11-A, Recovery of Attorney Fees, Public Interest Litigation [11-148].)

This approach comports with the law's mandate to award fees in all cases when the statutory criteria are met. (*Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 392 ["attorney fees must be awarded when the statutory criteria are met unless special circumstances render such an award unjust"].) If both sides meet the criteria, then both, rather than neither, are entitled to a fee award.

5. What Amounts Should be Awarded?

While both sides qualify as "successful parties," they did not succeed equally, and the court proportionately reduces the fees awarded based on the extent of each side's success. (*Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179, 1185 ["[a] trial court may reduce attorney fees based on the plaintiff's degree of success"].)

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[4] The treatise cites a case brought under a different fee-shifting doctrine. (See *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185, 193.)

Real Parties in Interest were the net winners, achieving about 70% (3.5 of 5.0) of their litigation goals. The court finds that the "adjusted amounts" listed below are reasonable based on the degree of success enjoyed by each side:

Party	Amount Claimed	Success Factor	Adjusted Amount[5]
Petitioner	$76,358.00	.3	$22,907.40
Real Parties	$93,024.50[6]	.7	$65,117.15

The net award is $42,209.75, payable to counsel for Real Parties in Interest.

IT IS SO ORDERED.

Dated: May 31, 2022

Daniel P. Maguire

DANIEL P. MAGUIRE
JUDGE OF THE SUPERIOR COURT

[5] The adjusted amount is the amount claimed multiplied by the success factor.

[6] This figure represents the claimed amount, minus requested costs in the amount of $1,510.38 ($464,62 plus $1,045.76). As stated above at page 14, the request for costs is denied without prejudice.