

1 Gregg McLean Adam, Bar No. 203436
gadam@cbmlaw.com
2 Gonzalo C. Martinez, Bar No. 231724
gmartinez@cbmlaw.com
3 Amber L. Griffiths, Bar No. 245002
agriffiths@cbmlaw.com
4 **CARROLL, BURDICK & McDONOUGH LLP**
Attorneys at Law
5 44 Montgomery Street, Suite 400
San Francisco, California 94104
6 Telephone: 415.989.5900
Facsimile: 415.989.0932

7
8 Attorneys for Plaintiff and Cross-Defendant
San Jose Police Officers' Association

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA

11
12 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

13 Plaintiff,

14 v.

15 CITY OF SAN JOSE, BOARD OF
16 ADMINISTRATION FOR POLICE AND
FIRE DEPARTMENT RETIREMENT PLAN
17 OF CITY OF SAN JOSE, and DOES 1-10,
inclusive,

18 Defendants.

19
20 AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS

Case No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928,
1-12-CV-226570, 1-12-CV-226574,
1-12-CV-227864, and 1-12-CV-2335660)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF AND CROSS-
DEFENDANT SAN JOSE POLICE OFFICERS'
ASSOCIATION'S MOTION FOR ATTORNEYS'
FEES**

Date: September 25, 2014
Time: 9:00 a.m.
Dept.: 2

The Hon. Patricia Lucas

Action Filed: June 6, 2012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND OVERVIEW	1
II. SJPOA IS ENTITLED TO REASONABLE ATTORNEYS’ FEES UNDER CALIFORNIA’S PRIVATE ATTORNEY GENERAL STATUTE	2
A. Plaintiffs Enforced an Important Public Right Because the Ruling Forbids Reliance on Reservation of Rights to Justify Contracts Clause Violations	3
B. Plaintiffs Meet the Section 1021.5 “Prevailing Party” Criteria Because They Won on the Central Issue of Reservation of Rights	5
C. The Necessity and Burden of Defending Vested Rights and Obtaining a Favorable Reservation of Rights Ruling Militates in SJPOA’s Favor	7
III. THE JUDGMENT COSTS RULING DOES NOT DETERMINE THIS 1021.5 FEES AWARD	9
IV. THE AMOUNT OF THE FEE AWARD SOUGHT IS REASONABLE AND SUPPORTED BY THE EVIDENCE	10
A. SJPOA’s Attorneys Worked a Reasonable Number of Hours on This Matter	11
B. The Applicable Hourly Rates Are Reasonable	11
C. If the Motion is Successful, SJPOA Is Entitled to Fees for Time Spent on It	12
V. CONCLUSION	13

TABLE OF AUTHORITIES

		Page(s)
1		
2		
3	Cases	
4		
5	<i>Azure Limited v. I-Flow Corp.</i> (2012) 207 Cal.App. 4th 60.....	3
6	<i>Baggett v. Gates</i> (1982) 32 Cal. 3d 128.....	7
7		
8	<i>Bowman v. City of Berkeley</i> (2005) 131 Cal. App. 4th 173.....	3
9	<i>Citizens Against Rent Control v. City of Berkeley</i> (1986) 181 Cal. App. 3d 213.....	7, 8, 9
10		
11	<i>Conservatorship of Whitley</i> (2010) 50 Cal. 4th 1206.....	8
12	<i>County of San Luis Obispo v. Abalone Alliance</i> (1986) 178 Cal. App. 3d 848.....	7
13		
14	<i>Folsom v. Butte County Assn. of Governments</i> (1982) 32 Cal. 3d 668.....	5
15	<i>Galan v. Wolfriver Holding Corp.</i> (2000) 80 Cal. App. 4th 1124.....	9
16		
17	<i>Graham v. DaimlerChrysler Corp.</i> (2004) 34 Cal.4th 553.....	5
18	<i>In re Adoption of Joshua S.</i> (2008) 42 Cal. 4th 945.....	2
19		
20	<i>Ketchum v. Moss</i> (2001) 24 Cal. 4th 1122.....	11, 12
21	<i>Los Angeles Police Protective League v. City of Los Angeles</i> (1986) 188 Cal. App. 3d 1.....	2, 4, 7, 12
22		
23	<i>Lyons v. Chinese Hosp. Ass'n</i> (2006) 136 Cal. App. 4th 1331.....	3
24	<i>Melnyk v. Robledo</i> (1976) 64 Cal. App. 3d 618.....	10
25		
26	<i>Otto v. Los Angeles Unified Sch. Dist.</i> (2003) 106 Cal. App. 4 th 328.....	7, 8
27	<i>Planned Parenthood, Inc. v. Aakhus</i> (1993) 14 Cal. App. 4th 162.....	5
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

PLCM Group Inc. v. Drexler
(2000) 22 Cal. 4th 1084..... 10, 11

Press v. Lucky Stores, Inc.
(1983) 34 Cal. 3d 311..... 2, 10

Serrano v. Priest ("Serrano III")
(1977) 20 Cal. 3d 25..... 2, 3, 5

Serrano v. Unruh ("Serrano IV")
(1982) 32 Cal. 3d 621..... passim

Sokolow v. County of San Mateo
(1989) 213 Cal. App. 3d 231..... 5, 6

Ventas Finance I, LLC v. California Franchise Tax Bd.
(2008) 165 Cal. App. 4th 1207..... 10

Woodland Hills Residents Ass'n v. City Council ("Woodland Hills II")
(1979) 23 Cal. 3d 917..... 3, 4, 5

Statutes

42 U.S.C.
section 1983..... 6

42 U.S.C.
section 1988..... 5

Code of Civil Procedure
section 1021.5..... passim

Code of Civil Procedure
section 1032..... 1, 9, 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.

INTRODUCTION AND OVERVIEW

The Court should exercise its discretion and award Plaintiff San Jose Police Officers' Association ("SJPOA") reasonable attorneys' fees under Code of Civil Procedure ("CCP") section 1021.5. SJPOA is the "prevailing party" under the statute because it vindicated "an important right affecting the public interest."¹ The Court's February 20, 2014 Statement of Decision, which concluded this high-profile litigation, ruled decisively in SJPOA's favor on the primary issue of whether the reservation of rights clause in the San Jose City Charter gave the City *carte blanche* discretion to undermine pension promises made to employees. SJPOA's victory on the reservation of rights issue directly applies to its members but also to *thousands* of City employees who are *not* represented by SJPOA in this litigation, yet benefit by it.

The City cannot credibly dispute the importance of the public rights at issue. The Mayor made clear his intention to overturn decades of vested rights doctrine precedent—a quest that continues with the City's appeal of the judgment.² The publicity the Mayor garnered generated extensive local, statewide, and national media. And had the City prevailed on this central question, the pension rights of millions of other California public employees would have been susceptible to like-minded attacks.

Recall, too, that the City sued SJPOA first, because it was well aware of the controversial legal position it was taking. Defending against the City's attack on vested rights, which began in federal court and finished in state court, came at great expense to SJPOA. Notably, neither SJPOA nor its members reaped pecuniary gain—police officers and retirees simply retained what was lawfully theirs. The expense of litigation is therefore unduly large relative to retention of the

¹ The Court's February 20, 2014 determination of costs contained in the Statement of Decision ("SOD"), should not control the fee ruling because it does not pertain to section 1021.5, under which the criteria as to how a party prevails differs from how a party prevails as to costs under CCP § 1032(4). (Discussed further at Section III.)

² SJPOA sought agreement that attorney fee motions could be reserved until after the appeal was decided. However, the City would not so stipulate, necessitating the present motion. (Declaration of Gregg Adam ["Adam Decl.,"] ¶ 10.)

1 status quo and the City should be required to bear its commensurate share of the litigation
2 expense.

3 **II.**

4 **SJPOA IS ENTITLED TO REASONABLE ATTORNEYS' FEES UNDER CALIFORNIA'S PRIVATE**
5 **ATTORNEY GENERAL STATUTE**

6 Plaintiffs are entitled to recover a reasonable award of attorneys' fees under the criteria laid
7 out in the private attorney general doctrine set forth in Code of Civil Procedure ("CCP") section
8 1021.5:

9 Upon motion, a court may award attorneys' fees to a successful party against
10 one or more opposing parties in any action which has resulted in the
11 enforcement of an important right affecting the public interest if: (a) a
12 significant benefit, whether pecuniary or nonpecuniary, has been conferred on
13 the general public or a large class of persons, (b) the necessity and financial
14 burden of private enforcement, or of enforcement by one public entity against
15 another public entity, are such as to make the award appropriate, and (c) such
16 fees should not in the interest of justice be paid out of the recovery, if any...

17 (*Id.*)

18 The trial court's determination that a constitutional right has been vindicated may establish
19 the first of the three elements requisite to the award (i.e., the relative societal importance of the
20 public right vindicated under the law). (*Serrano v. Priest* ("*Serrano III*") (1977) 20 Cal. 3d 25,
21 46, n. 18; *see, also In re Adoption of Joshua S.* (2008) 42 Cal. 4th 945, 957 [fees may be awarded
22 to plaintiffs enforcing the law via vindicating individual rights as against public entities].) The
23 three statutory factors are interrelated. (*See Press v. Lucky Stores, Inc.* (1983) 34 Cal. 3d 311,
24 319.) Courts take an expansive view of who benefits from such litigation. (*E.g., Los Angeles*
25 *Police Protective League v. City of Los Angeles* (1986) 188 Cal. App. 3d 1, 14.)

26 Section 1021.5 contains permissive terms—a court "may" award fees—but the California
27 Supreme Court has discussed the limits on the trial court's discretion. In *Serrano v. Unruh*
28 ("*Serrano IV*") (1982) 32 Cal. 3d 621, 633, the court stated the private attorney general doctrine
under CCP section 1021.5 requires a full fee award "unless special circumstances would render
such an award unjust." Absent such circumstances, the award must be made if the statutory

1 criteria are met. (*E.g., Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal. App. 4th 1331, 1344 [large
2 fee award to private contractor].)

3 **A. Plaintiffs Enforced an Important Public Right Because the Ruling Forbids**
4 **Reliance on Reservation of Rights to Justify Contracts Clause Violations**

5 Plaintiffs invalidated the City's basis for disregarding vested rights, namely its flawed
6 reliance upon reservation of rights language. Plaintiffs' success affirms the protections of the
7 Contracts Clause and protects all City employees' vested benefits. It affirms that public
8 employers may not craft Charter or contract language that extinguish already-vested benefits.

9 This justifies an award of attorneys' fees under California Code of Civil Procedure section
10 1021.5, which encourages: (1) lawsuits enforcing important public policies and rights; and (2)
11 lawsuits forcing public officials to follow the law. (*See Serrano v. Unruh* ("*Serrano IV*") (1982)
12 32 Cal. 3d 621, 632 ["A central function [of the private attorney general theory] is to call public
13 officials to account and to insist that they enforce the law"]; *Bowman v. City of Berkeley* (2005)
14 131 Cal. App. 4th 173, 176 [section 1021.5 encourages public interest litigation, which otherwise
15 could be too costly]; *Woodland Hills Residents Ass'n v. City Council* ("*Woodland Hills II*") (1979)
16 23 Cal. 3d 917, 933; *Azure Limited v. I-Flow Corp.* (2012) 207 Cal.App. 4th 60, 69 [mere private
17 enforcement of the law is insufficient for a fees award under CCP section 1021.5, because *an*
18 *important public right* must be enforced].) The California Supreme Court has held that where the
19 trial court makes a "determination that the public policy vindicated is one of constitutional stature
20 ... [this] establishes the first of the three elements requisite to the award [*i.e.*, the relative societal
21 importance of the public policy vindicated]." (*Serrano v. Priest* ("*Serrano III*") (1977) 20 Cal. 3d
22 25, 46, n. 18; *see also* CCP § 1021.5(a) ["a significant benefit, whether pecuniary or
23 nonpecuniary, has been conferred on the general public or a large class of persons"].)

24 Here, the twofold purpose of the private attorney general doctrine is satisfied. The Court's
25 ruling requires the City to comply with the law of vested benefits. Plaintiffs convinced the City to
26 drop its federal lawsuit against them and then prevailed in state court, overcoming the City's use
27 of the reservation of rights clause to justify *every* reduction of benefits within Measure B.

28

1 Beyond the direct benefit to City employees, the rights of public employees throughout
2 California are affirmed in a significant way. The Court's decision signals that pension reform
3 cannot be completed without consideration of already-existing obligations under the Contracts
4 Clause. A similar benefit was conferred to public employees throughout California in *Los Angeles*
5 *Police Protective League*, 188 Cal. App. at 11-12. The Court of Appeal ruled against the City of
6 Los Angeles after it refused to comply with a decision by one of its agencies, an employee
7 relations board. The outcome for the City employees was twofold: (1) the City must not charge its
8 employees new \$5 a month parking fee charge without complying with the order by the employee
9 relations board to comply with statutory meet and confer requirements; and (2) municipalities
10 must comply with their administrative agencies' rulings.

11 The Court of Appeal held the fees award under section 1021.5 was appropriate because the
12 principle vindicated was much broader than the disputed issues between the police officers' union
13 and the City: that is, cities throughout the State of California may not disregard decisions of their
14 own administrative agencies. (*Id.*) The court found the award appropriate because rights of
15 employees of *all* cities in California were affirmed. (*Id.*)

16 The right vindicated here is just as important and just as widely discussed in California.
17 The case received extensive local, state and national media coverage. Therefore, it will stand as a
18 cautionary message for public employers considering use of ballot measures and litigation to
19 engage in pension changes.

20 A section 1021.5 fees award is also appropriate where, as here, it encourages private
21 vindication of important rights by giving "teeth" to enforcement. In *Woodland Hills II*, the Court
22 of Appeal reversed an order denying a fees motion filed by the petitioners (a residents' association
23 and its members). The petitioners had obtained a writ of mandate barring local government
24 entities' improper approval of a new subdivision, in violation of California's Subdivision Map
25 Act. (23 Cal. 3d at 933.) *Woodland Hills II* emphasized the importance of awarding fees as a
26 deterrent and as a means to advance important public rights. (*Id.*) Absent section 1021.5 fees
27 awards, the private prosecution of important public rights under the law simply would be much
28 less common. (*Id.*)

1 Courts favor awarding section 1021.5 fees for advancement or affirmation of constitutional
2 or statutory rights. In *Serrano IV*, public interest attorneys who had successfully brought an equal
3 protection challenge to the financing of public schools were awarded fees under section 1021.5.
4 (32 Cal. 3d at 639; *see also Serrano v. Priest* (“*Serrano III*”) (1977) 20 Cal. 3d 25, 46, n. 18.);
5 *Planned Parenthood, Inc. v. Aakhus* (1993) 14 Cal. App. 4th 162, 170-71 [awarding fees where
6 constitutional right to privacy enforced, because “[a]lthough fundamental constitutional rights are
7 by nature individual rights, their enforcement benefits the entire public.”].) In *Sokolow v. County*
8 *of San Mateo* (1989) 213 Cal. App. 3d 231, 246, the Court of Appeal found fees warranted under
9 both CCP section 1021.5 and 42 U.S.C. § 1988. The plaintiffs had prevailed in a sexual
10 discrimination case against the County and a mounted patrol unit, vindicating Equal Protection
11 rights. (*Id.* at 245-246.). They did not obtain all of the relief they had sought, but fees were
12 nonetheless awarded because Equal Protection, as an important public right, was vindicated.

13 The public right at stake here is no less important. Public pensions implicate important
14 public rights and have been heavily litigated over the decades. The passage of Measure B was a
15 major public controversy and the litigation has been no less so. The City Council itself recognized
16 the significance of the rights by directing the City attorney to seek declaratory relief about the
17 validity of Measure B. (Adam Decl. Exs. A, B.) The Court’s decision goes beyond Measure B,
18 by vindicating not only employees’ right now but also impacting future benefits administration
19 and legislation. More significant to the fees award, the outcome of this litigation protects the
20 rights of City employees. (*See, e.g., Woodland Hills II* 23 Cal. 3d at 939-940.)

21 **B. Plaintiffs Meet the Section 1021.5 “Prevailing Party” Criteria Because They**
22 **Won on the Central Issue of Reservation of Rights**

23 Courts have taken a “broad, pragmatic view of what constitutes a “successful
24 party””. (*See Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565; *see, e.g., Folsom v.*
25 *Butte County Assn. of Governments* (1982) 32 Cal. 3d 668, 685.) Courts award attorneys’ fees
26 under Code Civ. Proc. § 1021.5 even where plaintiffs do not prevail on all claims, if they vindicate
27 an important public right. (*Sokolow v. County of San Mateo* (1989) 213 Cal. App. 3d 231, 245-
28 246; *Daniels v. McKinney* (1983) 146 Cal. App. 3d 42, 55–56.)

1 The Court did not award all relief sought by SJPOA, but this does not prevent an award of
2 attorneys' fees. (*Sokolow*, 213 Cal. App. 3d at 245-246 [appellants prevailed for purposes of CCP
3 section 1021.5, regardless of failing to receive all relief requested, because they vindicated an
4 important right].)

5 The defeat of the central plank of Measure B justifies an attorneys' fees award. It restricts
6 Measure B to pension changes that comply with the law and provides the City of San Jose and
7 other jurisdictions with guidance concerning the treatment of pension rights in the future. And it
8 directly impacts thousands of City employees—the vast majority of whom were not involved in
9 this litigation.

10 SJPOA prevailed by preserving the bulk of its members' vested benefits in this litigation.
11 Yet SJPOA need not have won even all the claims it did to still be deemed the "prevailing party"
12 for purposes of CCP section 1021.5 (*Sokolow*, 213 Cal. App. 3d at 246.) In *Sokolow*, the Court of
13 Appeal reversed an order denying attorneys' fees to plaintiffs who had prevailed in a sexual
14 discrimination case against the County and a separate entity, a mounted patrol unit ("the Patrol").
15 The Patrol had denied the plaintiffs admission. The trial court ruled in the plaintiffs' favor in
16 finding sex discrimination had occurred, but it denied plaintiffs' request to issue an order requiring
17 their admission into the Patrol. (*Id.*) It issued alternative, injunctive relief by requiring severance
18 of the County's more significant involvements with the Patrol. (*Id.*)

19 The Court of Appeal held that the trial court erred when it denied the fees motion because
20 plaintiffs did not achieve the relief they had requested. (*Id.* at 247.) What mattered was that
21 public rights, as set forth in CCP section 1021.5, were advanced. (*Id.*) The plaintiffs successfully
22 established that the relationship between the Patrol, a private entity, and the Sheriff's Department
23 was so entwined that the Patrol's discriminatory membership policy constituted state action in
24 violation of the equal protection clauses of the state and federal Constitutions as well as 42 U.S.C.
25 § 1983. (*Id.* at 244.) Prevailing on the law pertaining to important public rights warranted the fees
26 award. (*Id.* at 247.) The plaintiffs were, therefore, a "prevailing party" that had succeeded under
27 the section 1021.5 criteria:
28

1 On the basis of the appellants' complaint, the trial court's findings that the
2 County and the Patrol had violated appellants' constitutional rights, and the
3 actual content of the judgment specifically enjoining the respondents from
4 maintaining the kind of relationship they had had in the past, we conclude that
appellants were in fact the prevailing parties for purposes of attorney fees, and
that the denial of attorney fees was erroneous under both 42 United States Code
section 1988 and Code of Civil Procedure section 1021.5.

5 (Id.)

6 As explained above, Plaintiffs are “prevailing parties” for purposes of section 1021.5
7 because the litigation conferred a “significant benefit” advancing the public interest, pursuant to
8 section 1021.5(a) [“a significant benefit, whether pecuniary or nonpecuniary, has been conferred
9 on the general public or a large class of persons”].

10 **C. The Necessity and Burden of Defending Vested Rights and Obtaining a
Favorable Reservation of Rights Ruling Militates in SJPOA’s Favor**

11 The final prong of the statute is also met here because the burden, time, and expense of the
12 Measure B litigation outweighs any pecuniary benefit received by SJPOA or its members.

13 One purpose of CCP section 1021.5 is to encourage private lawsuits vindicating important
14 public rights as against public entities, by awarding fees where the burden of doing so outweighs a
15 plaintiff’s gains. (*County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal. App. 3d 848,
16 868 [“The ‘financial burden’ criterion . . . is met when ‘the cost of the claimant’s legal victory
17 transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a
18 burden on the [claimant] ‘out of proportion to his individual stake in the matter.’”]; *Otto v. Los
19 Angeles Unified Sch. Dist.* (2003) 106 Cal. App. 4th 328, 332.) It is not a matter of whether
20 pecuniary interests exist but whether the stake was out of proportion to the litigation costs.
21 (*Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal. App. 3d 213, 230-231.)

22 California courts recognize that public employee unions are entitled to section 1021.5 fees
23 when the financial stake of individual union members is not sufficiently great such as to justify the
24 fees spent to litigate against the government employer. (*See Los Angeles Police Protective
25 League v. City of Los Angeles*, 188 Cal. App. 3d 1 (1986) [awarding fees for defending against
26 city’s appeal]; *see also Baggett v. Gates* (1982) 32 Cal. 3d 128, 143 [affirming section 1021.5 fees
27 where police officer’s lawsuit enforced due process rights but might not have resulted in any
28

1 pecuniary benefit to plaintiffs]; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.
2 App. 3d 213, 231 [section 1021.5 inquiry is whether plaintiffs “had an *individual stake* that was
3 out of proportion to the costs of the litigation”].)

4 The necessity of challenging Measure B placed a burden on SJPOA “out of proportion to
5 [its] individual stake in the matter.” (*Otto v. Los Angeles Unified Sch. Dist.* (2003) 106 Cal. App.
6 4th 328, 332.)

7 SJPOA was necessarily involved in this suit. The City first sued SJPOA in federal court as
8 part of the City’s calculated attack on the employee pension rights.³ Then after SJPOA forced the
9 City to litigate solely in state court, it successfully defeated the lion’s share of successive City
10 Motions for Judgment on the Pleadings and Summary Adjudication. Plaintiffs analyzed decades
11 of Charter and other legislative history, hired an expert to interpret current and historic pension
12 plan and financial records, engaged in discovery including four depositions of current and former
13 city officials, defended seven depositions, responded to the City’s vigorous litigation of two
14 lengthy, dispositive motions, and extensively coordinated with other unions involved in the
15 litigation. (Adam Decl. ¶¶ 18, 22.)

16 Plaintiffs shouldered this burden of vindicating constitutional rights. The California
17 Supreme Court guides us that “in assessing the financial burdens and benefits in the context of
18 section 1021.5, we are evaluating incentives rather than outcomes.” (*Conservatorship of Whitley*
19 (2010) 50 Cal. 4th 1206, 1221.) Here, the necessity and expenses of litigating militates in
20 SJPOA’s favor. The City drew up Measure B, placed it on the ballot, determined it would sue for
21 declaratory relief, advised the unions that it would file suit against them, and then did so. (Adam
22 Decl. ¶ 9 and Exs. A, B.) There was no agency acting to protect the employees, who were, along
23 with their associations, required to act. (Adam Decl. ¶ 9.)

24
25
26
27 ³ As described in the Adam Declaration, SJPOA does not seek any time expended in the federal
28 matter. After the City dismissed its federal suit with SJPOA’s Motion to Dismiss pending, Judge
Koh denied SJPOA’s fee motion. (Adam Decl. at ¶ 21.)

1 A strong basis for a fees award exists because the City’s ballot measure, unchecked, would
2 have subverted constitutional guarantees by reliance and also because the fees award will act as a
3 deterrent to other municipalities.

4 Absent Plaintiffs’ participation in this lawsuit, Measure B would likely stand today. But
5 the cost, objectively speaking, to any employee or employee association, vastly outweighs the
6 gains made here. This is particularly significant because Plaintiffs simply defended the status of
7 their benefits as they existed before Measure B’s passage. (*See, e.g., Citizens Against Rent*
8 *Control*, 181 Cal. App. 3d at 230-31 [awarding fees where plaintiffs were not left in a better
9 pecuniary position than prior to passage of the ordinance at issue].) No additional pecuniary
10 interest was sought or gained beyond the pre-Measure B status quo.

11 Moreover, even taking into account the pecuniary benefits preserved, the expense of
12 litigation is still much greater than those benefits. In addition, SJPOA represents *current* police
13 officers who have yet to retire. (Adam Decl. ¶ 1.) The rights vindicated in their defense against
14 this lawsuit will not translate into paid retirement benefits until after they retire, which for some
15 may be several decades away.

16 III.

17 THE JUDGMENT COSTS RULING DOES NOT DETERMINE THIS 1021.5 FEES AWARD

18 The costs ruling is not dispositive as to the determination of a fees award under CCP
19 section 1021.5. In fact, it is not even influential because statutory provisions authorizing attorney
20 fees to the “prevailing party” are not subject to the definition of “prevailing party” in the general
21 costs statute. (CCP § 1032; *Galan v. Wolfriver Holding Corp.* (2000) 80 Cal. App. 4th 1124,
22 1128, [“[S]ection 1032 does not purport to define the term ‘prevailing party’ for all purposes.”].)

23 Section 1032 of the Code of Civil Procedure reads, in pertinent part, that the criteria for
24 awarding costs is as follows:

25 (4) “Prevailing party” includes the party with a net monetary recovery, a
26 defendant in whose favor a dismissal is entered, a defendant where neither
27 plaintiff nor defendant obtains any relief, and a defendant as against those
28 plaintiffs who do not recover any relief against that defendant. When any
party recovers other than monetary relief and in situations other than as
specified, the “prevailing party” shall be as determined by the court, and
under those circumstances, the court, in its discretion, may allow costs or not

1 and, if allowed may apportion costs between the parties on the same or
2 (Id.) adverse sides pursuant to rules adopted under Section 1034.

3
4 The City cannot reasonably argue that this Court’s prior costs ruling should influence the
5 section 1021.5 determination. The court’s decision in the SOD that each party should bear its own
6 costs was made before any party filed a statutory fees motion. Moreover, the decision that each
7 party shall bear its own costs relates not at all to whether “a significant benefit, whether pecuniary
8 or nonpecuniary, has been conferred” nor to this Court’s determination regarding “the necessity
9 and financial burden of private enforcement”. (*Compare* CCP § 1032(4) with CCP § 1021.5(a),
10 (b).) Thus, the Court should disregard arguments by the City that the costs determination is
11 pertinent here. (*See, e.g., Ventas Finance I, LLC v. California Franchise Tax Bd.* (2008) 165 Cal.
12 App. 4th 1207, 1235 [CCP sections 1021.5 and 1032 provide “different remedies befitting
13 different situations”].)

14 **IV.**

15 **THE AMOUNT OF THE FEE AWARD SOUGHT IS REASONABLE AND SUPPORTED BY THE EVIDENCE**

16 California courts generally apply the “lodestar” method – i.e., the number of hours
17 reasonably expended multiplied by the reasonable hourly rate – in determining the amount of a fee
18 award under section 1021.5. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal. 3d 311.) “Reasonable
19 hourly rate” is “that prevailing in the community for similar work.” (*PLCM Group Inc. v. Drexler*
20 (2000) 22 Cal. 4th 1084, 1095.) Further, the lodestar figure may be adjusted, based on the
21 particular circumstances of the case, “to fix the fee at the fair market value for the legal services
22 provided.” (*Id.*) Thus, the “trial court makes its determination after consideration of a number of
23 factors, including the nature of the litigation, its difficulty, the amount involved, the skill required
24 in its handling, the skill employed, the attention given, the success or failure, and other
25 circumstances of the case.” (*Id.* at 1096, citing *Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618,
26 623-24.)

1 **A. SJPOA’s Attorneys Worked a Reasonable Number of Hours on This Matter**

2 Prevailing parties are entitled to compensation for “all the hours reasonably spent.”
3 (*Ketchum v. Moss* (2001) 24 Cal. 4th 1122, 1133.) Here, the time records presented in the
4 Declaration of Gregg Adam support the number of hours SJPOA’s attorneys spent to litigate in
5 trial court. (Adam Decl. ¶¶ 17-22 and Ex. C.) The number of hours SJPOA applied to its
6 “Iodestar” calculation is fully documented by detailed time entries, prepared from
7 contemporaneous records kept in the regular course of business. (*Id.* ¶¶ 17, 22.) Those records
8 were reviewed by Gregg Adam, as the supervising attorney, with the exercise of billing judgment.
9 (*Id.* ¶ 17.) Hours billed to the client were reduced for inefficiencies. (*Id.* ¶¶ 17-18.)

10 Additionally, the hours were further reduced in the preparation of this motion to remove
11 hours that although billed to SJPOA are not being sought as part of this motion. (*Id.* ¶¶ 18-19.)
12 Consequently, the “Iodestar” figure includes significantly fewer hours than were spent litigating
13 this case.

14 **B. The Applicable Hourly Rates Are Reasonable**

15 Reasonable hourly rates for attorneys are determined based on “prevailing market rates.”
16 (*PLCM Group Inc.*, 22 Cal. 4th at 1097.) Courts consider factors such as “salaries, overhead, the
17 costs of support personnel, and incidental expenses.” *Id.* Moreover, courts must consider the
18 experience and expertise of the attorneys and the market rates for attorneys of comparable
19 experience and expertise. (*Serrano IV*, 32 Cal. 3d at 640-43 & n. 31.)

20 SJPOA’s Carroll Burdick & McDonough attorneys have considerable experience and
21 expertise with respect to labor litigation like this. (Adam Decl. ¶¶ 4-7, 11-12.) They are also
22 deeply familiar with the underlying facts, having represented Plaintiff SJPOA and been involved
23 with the issues underlying this case from the outset. (*Id.* ¶¶ 5, 11-12.)

24 Yet, despite the attorneys’ wealth of experience and expertise, SJPOA used hourly rates to
25 calculate the “Iodestar” that are at, or below, currently prevailing market rates for comparably
26 skilled Bay Area attorneys. (*Id.* ¶ 23.) While labor and employment law litigation rates in the Bay
27 Area are seldom below the level of \$475 per hour, SJPOA seeks \$450 per hour for partners. (*Id.*)
28 Associate rates of \$325 are also at or below the market rate. (*Id.*)

1 SJPOA proposes application of a multiplier of 0.75. (Adam Decl. ¶ 25.) SJPOA believes
2 this is a reasonable approach to the fact that it prevailed on the fundamental issue, that of
3 reservation of rights, but did not obtain relief as to all claims.

4 The below chart sets forth the lodestar calculation for all time spent on this lawsuit for
5 which an award of reasonable attorneys' fees is sought:

	<i>Hours</i>	<i>Hourly Rate</i>	<i>Multiplier</i>	<i>Lodestar</i>
Partners	1461.2	\$450	0.75	\$493,155.00
Associates	1648.3	\$325	0.75	\$401,773.13
Paralegal	207.7	\$175	0.75	\$27,260.62
TOTAL	3317.2			\$922,188.75

6
7
8
9
10
11 (See Adam Decl. ¶¶ 23-24 and Ex. C.) By way of comparison with the amount sought
12 herein, the City Council recently approved additional appropriations to a cumulative amount of
13 \$3,050,000 for opposing counsels' work on the litigation. (*Id.* at 27 and Ex. D.)

14 **C. If the Motion is Successful, SJPOA Is Entitled to Fees for Time Spent on It**

15 Under CCP section 1021.5, fees may be awarded for reasonable time spent on litigating a
16 motion for attorneys' fees. (*Serrano IV*, 32 Cal. 3d at 644; *Los Angeles Police Protective League*,
17 188 Cal. App. 3d at 14 [“[t]o the League’s costs must be added the cost of trying and appealing its
18 attorney fee request”]; *Ketchum*, 24 Cal. 4th at 1133 [“absent circumstances rendering the award
19 unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably*
20 *spent*, including those relating solely to the fee”].) (emphasis in original).

21 In order to provide an accurate calculation of fees incurred in pursuing this motion, SJPOA
22 will include detailed calculation of such with its reply papers. (Adam Decl. ¶ 26.)

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

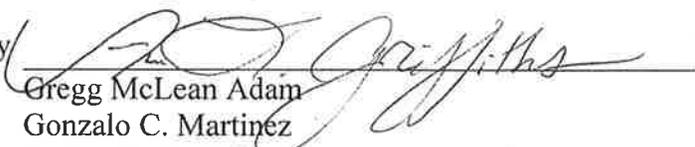
V.

CONCLUSION

For all these reasons, this Court should grant SJPOA its reasonable attorneys' fees incurred in this litigation.

Dated: July 30, 2014

CARROLL, BURDICK & McDONOUGH LLP

By 
Gregg McLean Adam
Gonzalo C. Martinez
Amber L. Griffiths
Attorneys for Plaintiff and Cross-Defendant
San Jose Police Officers' Association

Received
AUG 01 2014
Meyer's Hardware

135.023
✓ K. Thomas



US POSTAGE
\$ 06.50

Mailed From 94104
07/30/2014
031A 0002307216



44 Montgomery Street
Suite 400
San Francisco, CA
94104-4606

Arthur A. Hartinger, Esq.
Linda M. Ross, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607

Received
AUG 01 2014
meyers|nave

135.023
✓ K. Thomas
K. Thomas

038809