

1 entered an order determining that San Jose Police Officers' Association (POA), San Jose Retired
2 Employees Association (REA), and AFSCME Local 101 (AFSCME) (collectively, Plaintiffs) are
3 entitled to recover attorney fees. Following further briefing, the issue of the amount of fees to be
4 awarded was heard and submitted on January 6, 2015.

5 The court is "afford[ed] considerable deference" in making the determination of the
6 amount of fees and costs to be awarded. (*Collins v. City of Los Angeles* (2012) 205 Cal. App.
7 4th 140, 153 (*Collins*); *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal. App. 4th 691, 698.)
8 The court has considered only admissible evidence, and has not considered evidence presented
9 for the first time in reply which should have been presented in the moving papers.

10 I. PRINCIPLES GOVERNING SECTION 1021.5 FEE AWARDS

11 A. *The "Taxpayer Burden"*

12 Although the City argues in passing that the court should consider the fact that fee awards
13 in this case will be paid to "the plaintiff-organizations" and payment will "fall upon the
14 taxpayers of San Jose" (Opposition Memorandum, at 4:8-9), the City provides no authority for
15 that proposition. While the Supreme Court, in affirming a trial court's fee award, noted that one
16 of the "various relevant factors" the trial court considered was "the fact that an award against the
17 state would ultimately fall upon the taxpayers", it did not explain whether or how this factor
18 affected its decision. (*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 49.) Subsequent
19 cases have held that the fact that the payor is a governmental entity is not a valid reason to
20 reduce a fee award, either by applying a negative multiplier (*Rogel v. Lynwood Redevelopment*
21 *Agency* (2011) 194 Cal. App. 4th 1319, 1331-32) or by denying a positive multiplier where that
22 would otherwise be appropriate. (*Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359,
23 400 ("Allowing properly documented attorneys' fees to be cut simply because a losing party is a
24 governmental entity would defeat the purpose of the private attorney general doctrine codified in
25 Code of Civil Procedure section 1021.5 and would also incentivize governmental entities to
26 negligently or deliberately run up a claimant's attorneys' fees, without any concern for
27 consequences.")) Accordingly, the court has not reduced the fee award based solely on the fact
28 that the payor is a governmental entity.

1 B. *Partial Success on the Merits*

2 All parties acknowledge that the law requires a court faced with a section 1021.5 request
3 to consider the extent to which the success of the moving party has been less than complete. The
4 extent of success must be taken into account in determining reasonable fees. (*Sokolow v. County*
5 *of San Mateo* (1989) 213 Cal.App.3d 231, 248, 250 (*Sokolow*).) In a case of partial success, the
6 lodestar may be excessive, even if the claims were “interrelated, nonfrivolous, and raised in good
7 faith.... [T]he most critical factor is the degree of success obtained.” (*Hensley v. Eckerhart*
8 (1983) 461 U.S. 424, 436 (*Hensley*).) “A reduced fee award is appropriate if the relief, however
9 significant, is limited in comparison to the scope of the litigation as a whole.” (*Id.*, at 440.)

10 The court must inquire whether charges included in the lodestar are “unrelated” to the
11 moving party’s successful claims; “[w]ork on an unsuccessful and unrelated claim generally will
12 not be compensable.” (*Environmental Protection Information Center v. Department of Forestry*
13 *& Fire Protection* (2010) 190 Cal.App.4th 217, 238 (*EPIC*).) A claim is unrelated if based on
14 different facts and legal theories. (*Id.*, at 239.) If the court determines that the unsuccessful
15 claims are not related to the successful claims, then the second step of the *Hensley* test is not
16 required. (*Id.*) AFSCME misstates the law in suggesting that this second step is an alternative to
17 the preliminary inquiry. (AFSCME Reply Memorandum, at 4:5-6.)

18 While the court continues to believe that the City’s “issue-tallying” approach is not the
19 legally correct analysis, neither are Plaintiffs’ approaches sound. POA and REA urge that all
20 claims asserted are related because they all challenge Measure B (POA Reply Memorandum, at
21 4:11-14; REA Reply Memorandum, at 2:3-4), while AFSCME and REA argue that all claims are
22 related because they all affect vested rights. (AFSCME Reply Memorandum, at 5:5-6; REA
23 Reply Memorandum, at 2:4-6.) REA also argues that all claims are related because the
24 reservation of rights was a threshold issue. (REA Reply Memorandum, at 2:7-9.) Each of these
25 points, and all three of them together, are too simple to account for the complexity of the claims
26 presented to the court, and are not supported by the law.

27 “[A] common administrative record and a common procedural history are not sufficient
28 on their own to establish that claims are related.” (*EPIC, supra*, 190 Cal.App.4th at 244 (citation

1 omitted.) In *National Parks & Conservation Association v. County of Riverside* (2000) 81 Cal.
2 App. 4th 234, although plaintiffs were successful in challenging one Environmental Impact
3 Report and obtained an award of fees, they were not entitled to fees as to further litigation about
4 a second EIR on the same project. Although “technically within the same action”, the challenge
5 to the second EIR was “a substantively discrete action.” (Id., at 239-240.)

6 Distinct challenges to the same set of regulations are not “inseparable for the purposes of
7 attorney’s fees.” (*Sierra Club, supra*, 769 F.2d at 803.) Like the challenges in *Sierra Club*, each
8 of Plaintiffs’ various challenges to Measure B “involves a particular substantive concern of the
9 petitioners with a particular aspect of” the law, and “the different policy rationales and statutory
10 provisions set forth by the [City] as support for its decisions on different issues make the
11 different claims legally distinct.” (Id.) As the analysis set forth in the Statement of Decision
12 reflects, Plaintiffs’ successful claims are not related to the unsuccessful claims for purposes of a
13 section 1021.5 fee award.

14 Next, the court must determine how to adjust the fee award to take into account the
15 unrelatedness of the unsuccessful claims. In making such an adjustment, the court need not
16 identify specific hours to be eliminated but may instead reduce the award to account for limited
17 success. (*Hensley, supra*, 461 U.S. at 436-37.) Such an adjustment would be accomplished
18 through a negative multiplier. Although each Plaintiff urges the relative importance of the issues
19 on which it prevailed and argues that the court has the discretion not to reduce a fee award for
20 partial success, each Plaintiff has presented calculations that include a negative multiplier: for
21 AFSCME and REA, a negative multiplier of .85, and for POA, .75. The City argues that a
22 negative multiplier of .15 be applied to AFSCME and POA, and for REA, .20. The court is
23 aided in this analysis by its extensive knowledge of the pretrial, trial and posttrial proceedings in
24 this case, the claims and participation of each of the Plaintiffs, and the extent of the evidence and
25 the complexity of the arguments as to each issue.

26 The meaning of the vested rights doctrine and the significance of the City’s reservation of
27 rights were important and complex threshold issues on which Plaintiffs prevailed. Plaintiffs also
28 prevailed on two other issues: 1) the issue of pension contribution rates and the alternative

1 “Voluntary Election Program” (1506-A and 1507-A) which were subject to essentially identical
2 analyses, and 2) the issue of emergency reduction in cost of living adjustments (1510-A). Of the
3 issues on which Plaintiffs did not succeed, the more complex issues were the Supplemental
4 Retiree Benefit Reserve (1511-A), disability retirement (1509-A), and retiree health care benefits
5 (1512-A). The remaining issues on which Plaintiffs did not prevail were less involved, legally
6 and factually: reservation of voter authority (1504-A), actuarial soundness (1513-A), alternative
7 wage reduction (1514-A), severability (1515-A), promissory and equitable estoppel, and Bane
8 Act violations. AFSCME asserted all these claims. POA asserted all but the estoppel claims. In
9 addition to the threshold reservation of rights issue, REA succeeded only on the COLA claim,
10 lost on the issues concerning SRBR, healthcare, actuarial soundness, voter authority, and
11 severability, and did not argue the contribution rates/VEP, disability retirement, or wage
12 reduction issues. Taking into account all the pertinent factors, the court determines that the
13 appropriate negative multiplier for AFSCME and POA is .50, and for REA, .65.

14 Plaintiffs presented argument that the fees-on-fees portion of the award (i.e., fees spent
15 on fee-related litigation) should not be subject to a negative multiplier, while the City argued that
16 it should be so subject. Although all parties agreed that no published case addresses this point,
17 AFSCME directed the court to *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 582-
18 583 (*Graham*), focusing in particular on the portion of the Supreme Court’s opinion addressing
19 the application of multipliers to fee-related litigation. In remanding the case to the trial court for
20 further consideration of entitlement to fees, the Supreme Court rejected the defendant’s argument
21 that a positive multiplier could never be applied to fees-on-fees, since “[s]uch a rule does not
22 appear in harmony with the principle that the awarding of attorney fees and the calculation of
23 attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial
24 court.” (*Id.*, at 581.) On remand, the trial court was directed to consider whether a positive
25 multiplier should be applied to fees-on-fees.

26 Under *Graham*, the trial court has the discretion to treat fees-on-fees the same as or
27 differently from lodestar fees for purposes of a multiplier, keeping in mind the policies
28 underlying section 1021.5. In exercising its discretion in applying a negative multiplier when the

1 party entitled to fees accomplished only partial success, a trial court may consider the extent to
2 which it is “in the interest of justice”, given all the circumstances of the case, for that party to
3 bear its own attorney fees. (*Collins, supra*, 205 Cal. App. 4th at 157-58.) In this case, given the
4 partial extent of Plaintiffs’ success on the merits, it is consistent with the policies underlying
5 section 1021.5 to treat fee-related litigation in the same way as the lodestar fees, and to apply the
6 negative multiplier to those fees to limit Plaintiffs’ recovery.

7 *C. Plaintiffs’ Financial Stake in the Outcome*

8 The City argues that, even apart from Plaintiffs’ partial success on the merits, the court
9 has authority to reduce the claimed fees by “apportioning” the payment of fees between them
10 and the City, based on Plaintiffs’ financial stake in the litigation. In this regard, the City relies
11 on *Collins* in which a class of plaintiffs who had been arrested for driving under the influence of
12 alcohol or drugs received bills from the City of Los Angeles for emergency response costs. The
13 judgment entered after trial included a refund payment to class members totaling \$464,218, as
14 well as debt forgiveness of \$896,185 for class members who had not paid the City’s bill. The
15 Court of Appeal considered both sums, holding that “in determining the amount of attorney fees
16 that a plaintiff reasonably could be expected to bear for purposes of apportioning a fee award
17 under section 1021.5, a court should consider not only the actual or expected monetary recovery
18 but the full monetary value of the judgment.” (*Collins, supra*, 205 Cal. App. 4th at 158.) On
19 that basis, the appellate court held that it was reasonable to require plaintiffs to be responsible for
20 fees to the extent of 25% of the value of the judgment, and affirmed the trial court’s allocation.

21 Unlike *Collins* where the plaintiffs won a precisely quantified and current sum, partly in
22 refunds and partly in debt forgiveness, here Plaintiffs’ judgment deals with unquantified future
23 sums. Therefore, *Collins* does not provide a basis to reduce Plaintiffs’ fee award beyond the
24 negative multiplier.

25 II. AFSCME

26 AFSCME seeks \$513,441.25, which reflects a \$275 blended hourly rate. The request is
27 supported by a Memorandum and a Reply Memorandum, Declarations of Teague Patterson and
28 Robert Bezemak, Reply Declaration of Vishtasp Soroughsian, and “Supplemental” Declaration

1 of Teague Patterson. AFSCME also makes a Request for Judicial Notice and a “Supplemental”
2 Request for Judicial Notice, which are granted.

3 The City argues that some of the tasks performed were unnecessary and/or an
4 unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the
5 tasks performed and the amount of time spent was reasonable, with the exception of the fees
6 incurred in the federal case in the amount of \$27,280. California law gives the trial court
7 discretion to award fees incurred in work on another case when that work was “useful to [the]
8 resolution” of the action in which the fees are sought. (*Children's Hospital & Medical Center v.*
9 *Bontá* (2002) 97 Cal. App. 4th 740, 779-80.) In this case, the work in the federal case did not
10 “materially contribute” to the resolution of any issues in the case, nor did it diminish the work of
11 the court or counsel in this case. (*Id.*, at 781.)

12 After subtracting the fees related to the federal case, the remaining fees are adjusted from
13 \$486,131.25 to \$571,919.11 to back out AFSCME’s negative multiplier of .85. Then, applying
14 the negative multiplier of .50, the total for AFSCME fees is \$285,959.55

15 III. POA

16 POA seeks \$967,335, which reflects hourly rates from \$175 to \$450. The request is
17 supported by a “Supplemental” Memorandum and Reply Memorandum, a Declaration of Franco
18 Vado, “Supplemental” and “Second Supplemental” Declarations of Greg Adam, and a Reply
19 Declaration of Gonzalo Martinez. POA clarifies in the “Supplemental” Memorandum at p.2, n.
20 1, that all points and authorities on which it relies in making this request are set forth therein.

21 The hourly rates identified in POA’s motion are reasonable, with one caveat. POA
22 requests an award of fees for work in which partners billed nearly as many hours as associates:
23 1,548 partner hours at \$450 compared to 1,712 associate hours at \$325 and 209.4 paralegal hours
24 at \$175. (Reply Memorandum, at 10:21-24.) This generally would not be considered an
25 optimally efficient approach. Partner hourly rates are justified by the efficiency achieved in
26 delegating work to the competent person with the lowest billing rate. Even in important
27 litigation, attention to this principle is necessary to warrant higher rates for more experienced
28 lawyers. There are significant inefficiencies when senior lawyers undertake to accomplish tasks

1 in which their level of experience is not utilized: that happened in this case. Accordingly, the
2 partner billing rate is adjusted to \$375.

3 The City argues that some of the tasks performed were unnecessary and/or an
4 unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the
5 tasks performed and the amount of time spent was reasonable, with certain exceptions. With
6 respect to the POA's opposition to the City's successful motion to dismiss the seventh cause of
7 action for violation of the MMBA, the City argues for deletion of 109.1 partner hours and 43.1
8 associate hours, to which POA provides no response. Accordingly, those hours will be deleted.
9 The City also argues that POA should not recover for time spent (76 partner hours and 2.6
10 associate hours) on two motions that were never made: a motion for judgment on the pleadings
11 and a motion to strike the City's summary adjudication motion. POA responds that the time
12 spent was "*fully put to use* in developing legal strategy and argument" to oppose the City's
13 motion for summary adjudication. (Reply Memorandum, at 8:15 (emphasis in original).)
14 However, POA's position that no reduction whatever is warranted is not plausible and is not
15 supported either by the time entries or by the Martinez Declaration on which POA relies. While
16 Mr. Martinez explains that he was able to "build on" the legal research done (Martinez
17 Declaration, at 4:2), the time entries show that many hours were spent on drafting and "extensive
18 revisions". Accordingly, 47.3 partner hours will be deleted. Finally, the proposed judgment was
19 not efficiently handled, and 32 associate hours are deleted.

20 If the negative multiplier included in POA's calculations is backed out, the amount of
21 fees would be \$1,289,780. The reductions in hours detailed above bring the partner hours down
22 from 1,548.3 to 1,391.9, and associate hours from 1,712 to 1,636.9. Applying the reduced billing
23 rate of \$375 and adding the paralegal hours, the revised total equals \$1,081,438.75. Applying to
24 this number a negative multiplier of .50 brings the total POA fees to \$540,719.37.

25 IV. REA

26 REA seeks \$532,340, which reflects hourly rates from \$250 to \$600. The request is
27 supported by a "Supplemental" Memorandum and a Reply Memorandum, a "Supplemental"
28 Declaration of Stephen Silver and a Declaration of Jacob Kalinski. REA also intends that the

1 court consider its brief and the Declaration of Mr. Silver filed July 30, 2014. That Declaration
2 summarizes Mr. Silver's professional background, states the actual rates charged to REA, and
3 also states that these rates are lower than those charged "in the community" (not specified).

4 The City argues that the hourly rates claimed by REA are not supported by proof and are
5 unreasonable. The only information provided about the professional background and experience
6 of REA attorneys other than Mr. Silver are parenthetical phrases in Mr. Silver's Declaration
7 which do not supply the measure of proof required under *Ajaxo, Inc. v. E*Trade Group* (2005)
8 135 CA4th 21, 65. In the absence of such proof, the most persuasive evidence provided is the
9 actual rates charged, so the court will adopt such rates for the other attorneys.

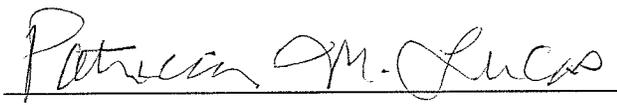
10 It does not appear that REA has presented evidence addressing the relevant Bay Area
11 community rather than Los Angeles where counsel have their offices: a reasonable hourly rate
12 for purposes of a fee award takes into account "the community" relevant to the inquiry. (*PLCM*
13 *Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.) At the hearing, REA argued that Mr.
14 Silver's professional accomplishments were at least equal to those of Mr. Adam representing
15 POA, and that the court should therefore apply to Mr. Silver's time the "Bay Area rate" of \$450
16 requested by POA. As to Mr. Silver's time, there is sufficient evidence to support such a rate.

17 With REA as well, the City argues that some of the tasks performed were unnecessary
18 and/or an unnecessarily large amount of time was spent on certain tasks. Generally, the court
19 finds that the tasks performed and the amount of time spent was reasonable, with two exceptions.
20 First, given REA's limited role at trial, it was not reasonably necessary to have two lawyers
21 present for the entire trial. REA's response, set forth in Mr. Kalinski's Reply Declaration at
22 11:8-19, is not convincing: neither his review of documents before trial nor his responsibilities
23 for ensuring that REA's exhibits were offered into evidence justifies attendance in the courtroom
24 all day every trial day. Accordingly, 46.3 hours of Mr. Kalinski's time are deleted. Second, the
25 travel time is not reasonable, and 50.9 hours of Mr. Silver's time and 65.2 hours of Mr.
26 Kalinski's time are deleted.

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Deleting the hours listed above, adding in the hours on this motion, and using the hourly rates supported by the evidence, the revised lodestar is \$327,897.50. Applying to this number a negative multiplier of .65 brings the total REA fees to \$213,133.37.

Dated: January 13, 2015



Honorable Patricia M. Lucas
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

(ENDORSED)
FILED
JAN 14 2015

DAVID H. YAMASAKI
Chief Executive Officer/Clerk,
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

TO: Arthur A Hartinger
Meyers Nave Riback Silver Et Al
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Oakland, CA 94607

RE: San Jose Police Officers' Association Vs City Of San Jose
Case Nbr: 1-12-CV-225926

PROOF OF SERVICE

ORDER DETERMINING AMOUNT OF PLAINTIFF'S ATTORNEY FEES

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

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If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at

San Jose, CA on 01/14/15. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Naomi Matautia, Deputy