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Attorneys for Intervener-Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

MONA FIELD, *et al.*,
Plaintiffs,
vs.
DEBRA BOWEN, *et al.*,
Defendants.

CALIFORNIANS TO DEFEND THE OPEN PRIMARY (*formerly known as* YES ON 14-CALIFORNIANS FOR AN OPEN PRIMARY), CALIFORNIA INDEPENDENT VOTER PROJECT; ABEL MALDONADO,
Intervener-Defendants.

Case No.: CGC-10-502018

INTERVENER-DEFENDANTS CALIFORNIANS TO DEFEND THE OPEN PRIMARY & INDEPENDENT VOTER PROJECT'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF [C.C.P. § 1021.5]

DATE: May 3, 2012
TIME: 9:30 a.m.
DEPT: 302
JUDGE: Hon. Harold E. Kahn

BY FAX

NIELSEN MERKSAMER
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT on May 3, 2012, at 9:30 a.m. in Department 302 of the above Court located at 400 McAllister Street, San Francisco, California 94102, Intervener-Defendants CALIFORNIANS TO DEFEND THE OPEN PRIMARY (formerly Yes on 14 – Californians for an Open Primary) and CALIFORNIA INDEPENDENT VOTER PROJECT, will move for an award of attorneys' fees under Code of Civil Procedure § 1021.5 in the amount of $199,854.00 (plus additional amounts that may be incurred in litigation this motion), against Plaintiffs herein.[1]

The motion will be made on the ground that Movants are "successful" parties in this action within the meaning of Code of Civil Procedure § 1021.5, and that they meet all the criteria for an award of fees under that section.

The motion will be based upon this notice, the memorandum of points and authorities, any declarations filed herewith, the reply papers to be filed, oral argument, and the pleadings and records in this action.

Respectfully submitted,

Dated: March 27, 2012

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: _____
Christopher E. Skinnell
Attorneys for Intervener-Defendants

[1] Intervener-Defendant Abel Maldonado does not seek an award of fees in this case.

I. INTRODUCTION.

This is a motion for attorneys' fees under Code of Civil Procedure § 1021.5 by Intervener-Defendants CALIFORNIANS TO DEFEND THE OPEN PRIMARY ("CADOP") and CALIFORNIA INDEPENDENT VOTER PROJECT ("IVP") (hereafter jointly "Movants"). All criteria for such an award are met in this case.

This case involved an effort by Plaintiffs to block the enforcement of Proposition 14 (the Top-Two Candidate Open Primary Act, adopted by the voters at the June 2010 statewide primary election), based on the alleged unconstitutionality of two minor provisions of Proposition 14's implementing legislation, Senate Bill 6 (2009-2010 Reg. Sess.), *codified at* Cal. Stats. 2009, ch. 1 ("SB 6"). Plaintiffs sought to enjoin SB 6 and Proposition 14 in their entirety. Movants intervened in this case and successfully opposed Plaintiffs' efforts, ultimately obtaining a published Court of Appeal opinion rejecting Plaintiffs' claims, *Field v. Bowen*, 199 Cal. App. 4th 346 (2011), and a judgment in Interveners' favor on all causes of action alleged in the First Amended Complaint.

Intervener-Defendants incurred nearly $300,000 in attorneys' fees to litigate this case, over the course of 18 months. This sum was, in significant part, attributable to Plaintiffs' scorched-earth approach to this litigation. The Declaration of Christopher E. Skinnell, filed herewith (¶¶ 12-13), recounts the course of this litigation and the many unnecessary and legally questionable actions taken by Plaintiffs that forced Interveners to expend resources to oppose, ultimately successfully in all instances including:

- Forcing Interveners to bring a formal motion to intervene in this case, even though long-established case law squarely supports the right of a ballot measure's sponsors and drafters to intervene in litigation, and even though Interveners had requested a stipulation to intervention prior to filing their motion;

- Declining to *even cite* controlling case law (*Libertarian Party v. Eu,* 28 Cal. 3d 535 (1980)) in its initial motion for preliminary injunction, and raising new legal theories and selectively mis-citing SB 6's legislative history in their reply brief, thereby necessitating an extra round of briefing;
- Bringing a petition for a writ of mandate in the Court of Appeal, seeking to enjoin the implementation of Proposition 14 at an election to which Proposition 14 *did not even apply* (the January 4, 2011 special general election in Senate District 1);
- Bringing a petition for writ of mandate in the Supreme Court, seeking to enjoin the implementation of Proposition 14 at the June 2012 primary election—then still more than 18 months away—rather than merely appealing the denial of the preliminary injunction in due course.
- Attempting, in four separate motions, to bring new intervening plaintiffs and claims into *every single* stage of the proceedings. These included Linda Hall's first unsuccessful motion to intervene in the writ proceedings in the Court of Appeal, and her second unsuccessful motion to intervene on the same claims, long after the Court of Appeal decided this case on the merits. As this Court knows, her second motion sought to add frivolous, moot claims for relief that would have required this Court to ignore a binding Court of Appeal decision; and
- Refusing to stipulate to entry of judgment after the Court of Appeal's dispositive ruling on the merits, and forcing Interveners to file a motion for judgment on the pleadings;
- Then seeking to drag out the litigation still further by moving to amend the complaint, to add Ms. Hall and her claims, after Hall's motion to intervene was denied.

Such tactics, though meritless, required continuous legal research, analysis, briefing and litigation activity from Intervener-Defendants.

II. ARGUMENT.

Code of Civil Procedure section 1021.5 provides 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 another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.[1] With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor, . . .

Section 1021.5 embodies California's "private attorney general doctrine." *See Woodland Hills Residents Ass'n, Inc. v. City Council*, 23 Cal. 3d 917 (1979) ("*Woodland Hills*"); *Serrano v. Priest*, 20 Cal. 3d 25 (1977) ("*Serrano III*"). The underlying purpose of the private attorney general doctrine is to encourage private enforcement of important rights affecting the public interest. *Woodland Hills,* 23 Cal. 3d at 933-42.

If the Section 1021.5 criteria are met, a court *must* grant the fee motion. *See City of Sacramento v. Drew*, 207 Cal. App. 3d 1287, 1297 n.3 (1989) ("*Drew*"); *Serrano v. Unruh,* 32 Cal. 3d 621, 623-33 and n.17 (1982) ("*Serrano IV*") (presumption that fees should be awarded if the statutory criteria are met unless the award would be unjust).

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[1] This criterion is inapplicable in this case because there was no monetary recovery. *See Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 83 n.26 (2005); *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 318 n.5 (1983).

A. CADOP And IVP Are Successful Parties In This Action.

Movants are unquestionably successful parties in this action for purposes of an attorneys' fees award under section 1021.5. Plaintiffs sought an injunction against the enforcement of Proposition 14 and SB 6 in their entirety. Movants defended against these efforts and were successful at every turn, including: (1) successfully opposing a motion for preliminary injunction in this Court, (2) successfully opposing Plaintiffs' petition for writ of mandate in the California Court of Appeal for the 1st Appellate District and a motion to intervene by new parties represented by Plaintiffs' counsel,[2] (3) successfully opposing Plaintiffs' petition for writ of mandate in the California Supreme Court,[3] (4) successfully opposing another ill-conceived motion to intervene by yet other new parties represented by Plaintiffs' counsel, and obtaining a unanimous, thoroughly-reasoned, thirty-page published opinion from the Court of Appeal holding that the challenged provisions of SB 6 are facially constitutional as a matter of law,[4] (5) again in this Court, successfully opposing yet another motion to intervene by a party represented by Plaintiffs' counsel, and opposing Plaintiffs' tenacious efforts to amend the complaint to prolong the action; and (6) obtaining a judgment in Interveners' favor on all the causes of action stated in the First Amended Complaint. Simply put, there was no consequential part of this litigation on which Movants did not prevail. Such an unequivocal and unbroken string of victories unquestionably makes Movants "successful" parties in this action.

Though plaintiffs are most commonly awarded fees under section 1021.5, it is well-established that defendants are eligible for fee awards like any other successful private litigant:

> [U]nder the proper circumstances attorney fees may be awarded to parties who successfully *defend* a public interest lawsuit. "Generally

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[2] *Field v. Superior Court*, Case No. A129829 (Cal. Ct. App. 1st Dist.).
[3] *Field v. Superior Court*, Case No. S188436 (Cal.).
[4] *Field v. Superior Court*, Case No. A129946 (Cal. Ct. App. 1st Dist.).

> speaking, the opposing party liable for attorney fees under section 1021.5 has been the defendant person or agency sued, which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation." [Citation.] However, to effectuate the policy of providing substantial attorney fees to successful litigants in suits enforcing important public policies, the courts "have taken a broad, pragmatic view of what constitutes a 'successful party.'" [Citation.] . . . Thus, prevailing defendants are entitled to attorney fees upon a proper showing. [Citations.] "[S]ection 1021.5 draws no distinctions between plaintiffs and defendants as a 'successful party.'" [Citation.] An award of attorney fees pursuant to section 1021.5 is available if a party defends an action "'primarily to advance'" a public interest "'rather than personal interests.' [Citation.]" [Citation.]

DiPirro v. Bondo Corp., 153 Cal. App. 4th 150, 198-99 (2007), *rev. denied*, 2007 Cal. LEXIS 12089 (Cal. Oct. 24, 2007).[5]

This is so even when, like Movants, the party seeking fees intervened as a defendant rather than being named as a defendant by the plaintiff. "A party who satisfies the criteria for intervention and who contributes to the success of public interest litigation should be entitled to an award of attorneys' fees on the same terms as any other party." *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 82-90 (2005), *rev. denied*, 2005 Cal. LEXIS 4616 (Cal. Apr. 27, 2005) ("*Stewart*") (overruling district court's refusal to award fees to intervening ballot measure sponsor in post-election litigation). *See also Consumer Cause, Inc. v. Mrs. Gooch's Nat'l Food Markets, Inc.*, 127 Cal. App. 4th 387, 402 (2005) ("an individual may fulfill his or her role as a private attorney general in a variety of ways: prosecuting an action; defending it; *or shouldering the burden of litigation after having intervened in the action*." (emphasis added; citations omitted)); *Montgomery v.*

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[5] It is equally unquestionable that Plaintiffs are the "opposing" parties by whom fees are appropriately paid under section 1021.5. "An 'opposing party' against whom attorney fees may be awarded pursuant to Code of Civil Procedure section 1021.5 is defined broadly as 'a party whose position in the litigation was adverse to that of the prevailing party. Simply put, an "opposing party" within the meaning of section 1021.5 is a losing party.'" *DiPirro*, 153 Cal. App. 4th at 198-99.

Bio-Med Specialties, 183 Cal. App. 3d 1292, 1296 (1986) ("Since plaintiffs would have been entitled to receive attorneys' fees from interveners had plaintiffs prevailed against Bio-Med, interveners are entitled to recover their fees incurred in successfully defending against that claim.").[6]

B. <u>Movants' Victory Vindicated An Important Right Affecting the Public Interest, Conferring Significant Benefits On The Public And Large Classes Of Persons</u>.

There can also be no question that Movants' victory vindicated an important right affecting the public interest and conferred significant benefits on the public and large classes of persons. As the California Supreme Court has recognized, "[E]lection law litigation inherently implicates public rights." *Adoption of Joshua S.*, 42 Cal. 4th 945, 957 n.4 (2008).[7] This is especially so when the case resulted in a published appellate decision.[8]

More specifically, Movants' successful defense of this lawsuit prevented Plaintiffs from obtaining a court order or judgment that would have delayed or even blocked the implementation of Proposition 14 and SB 6. California's voters adopted Proposition 14 for the purpose of reforming their dysfunctional government, to:

- "Reduce gridlock by electing the best candidates to state office and Congress, regardless of political party;
- "Give independent voters an equal voice in primary elections; and
- "Elect more practical individuals who can work together for the common

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[6] While *Montgomery* was a decision under Civil Code § 1717, the courts have treated decisions under that section regarding who is a "prevailing" or "successful" party as relevant to the same determination under Code of Civil Procedure § 1021.5. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 571 (2004).

[7] *See also Wal-Mart Real Estate Business Trust v. City Council of San Marcos*, 132 Cal. App. 4th 614 (2005) ("*Wal-Mart*") (overruling trial court's refusal to award fees to ballot measure sponsors in successful defense of pre-election challenge to measure); *Stewart*, 126 Cal. App. 4th at 83-84 (City of Pasadena conceded that initiative sponsor's successful defense of measure's constitutionality conferred a significant benefit on the public).

[8] *See Los Angeles Police Protective League v. City of Los Angeles*, 188 Cal. App. 3d 1, 12 (1986) (publication of an appellate opinion provides "strong evidence" that the underlying suit vindicated an important public right).

good."

Interveners' Request for Judicial Notice in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed Aug. 30, 2010, Exhibit B, p. 19 (Rebuttal To Argument Against Proposition 14).

An injunction against Proposition 14 would have frustrated these purposes, and—given that the measure was opposed by virtually the entire political establishment in Sacramento (and probably in Washington as well)[9]—would have threatened to "insulate the Legislature from any severe reform measures directed at that branch . . . ." *Legislature v. Eu,* 54 Cal. 3d 492, 511-12 (1991) (upholding a voter-enacted legislative reform measure, term limits).

Second, Proposition 14 gives unaffiliated/DTS voters new constitutional rights to participate in primary elections. An injunction would have deprived 3.4 million independent voters (represented by Intervener IVP) of their newly-won constitutional rights. *See* Declaration of David Takashima, filed Aug. 17, 2010, at ¶¶ 1-2, 4-5 and 7-12.

Third, Proposition 14 gives many voters who *are* registered with the qualified parties, new rights as well. Under the pre-Proposition 14 system, in districts heavily dominated by one party (*e.g.,* Democrats in San Francisco, Republicans in Orange County), voters of the other parties often had no meaningful opportunity to participate in the electoral process; the election was decided in the dominant party's primary, in which voters registered with other parties could not vote. *See* Cal. Elec. Code §§ 2151, 13102; Maldonado Decl., ¶ 11. Proposition 14 gives those voters the ability to cast a meaningful ballot in the primary, giving them the prospect of actually affecting elections. Enjoining enforcement of Proposition 14 would have again relegated these voters to insignificant status.

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[9] *See* Declaration of Abel Maldonado in Support of Intervention, filed Aug. 17, 2010, ¶ 5.

And finally, an injunction against Proposition 14 would have deprived candidates who are not affiliated with qualified parties of the ability to participate in the primary election. The only way for such candidates to have their name placed on the general election ballot would be to proceed as an independent candidate, with signature and timing requirements that are far more burdensome than the requirements of Proposition 14.[10]

These are *exactly* the kinds of benefits to the public that merit an award of fees under Code of Civil Procedure § 1021.5. *See Stewart*, 126 Cal. App. 4th at 83-84 (ballot measure proponent's post-election defense of measure's constitutionality conferred significant benefits on the public); *Wal-Mart*, 132 Cal. App. 4th at 622-23 (because initiative and referendum rights are some of the most precious in our democratic process, litigants who defend those rights confer a significant benefit on the public).

C. The Necessity And Financial Burden Of Private Enforcement Make the Award Appropriate.

Private enforcement was necessary in this case. While the Secretary of State did actively defend the suit, the ultimate success of the defense of this action was substantially attributable to Movants' participation as Intervener-Defendants. California's courts have expressly held that "private parties who cooperate with governmental officials in successful public interest litigation, *and who contribute significantly to the result*, may recover attorney fees under section 1021.5." *See Nestande v. Watson*, 111 Cal. App. 4th 232, 240 (2003) (emphasis added).[11]

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[10] *Compare* Elec. Code § 8062 (65 to 100 signatures required to seek nomination of qualified party for statewide office) *with* Elec. Code § 8400 (1% of registered voters statewide must sign nomination papers for an independent candidate to run statewide); *see also* Elec. Code § 8403(a)(1) (only 60 days to collect signatures on independent nomination papers for statewide office).

[11] *See also Comm. to Defend Reproductive Rights v. A Free Pregnancy Ctr.*, 229 Cal. App. 3d 633, 642-44 (1991); *People ex rel. Brown v. Tehama County Bd. of Supervisors*, 149 Cal. App. 4th 422, 452 (2007).

"An important question in determining whether the services of the private party were necessary is, 'Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material non *de minimis* contribution to its judgment, which were nonduplicative of those advanced by the governmental entity?'" *McGuigan v. City of San Diego*, 183 Cal. App. 4th 610, 635 (2010) (quoting *Comm. to Defend Reproductive Rights*, 229 Cal. App. 3d at 643-44). In this case, the answer that question is an unambiguous "yes"—the Court of Appeal did adopt legal theories advanced only by Interveners, thereby warranting an award of fees.

In the first place, it was Interveners—and *only* Interveners—who argued that SB 6 prohibits the casting of write-in votes as well as their counting; the Secretary agreed with Plaintiffs' interpretation of SB 6 that such votes could be cast without being counted (though the Secretary disputed Plaintiffs' contention that such a system was unconstitutional). The Court of Appeal explicitly endorsed Interveners' interpretation on this point, holding that the Plaintiffs'/Secretary's interpretation "raises constitutional questions." *Field*, 199 Cal. App. 4th at 371-72.

Second, in rejecting the Plaintiffs' ballot label claims, the Court of Appeal expressly cited Interveners' thorough briefing on the ongoing rights of political parties in support of its holding that *Libertarian Party v. Eu,* 28 Cal. 3d 535 (1980), remains good law in the context of Proposition 14. This holding was "dispositive of plaintiffs' constitutional arguments against the 'nonqualified party preference ban' provided in Senate Bill 6" (*Field*, 199 Cal. App. 4th at 359):

> Plaintiffs argue that *Libertarian Party* cannot be applied here because the case was based on a qualified party system that Proposition 14 and Senate Bill 6 "dismantled" by doing away with partisan primaries. *This contention is persuasively refuted in interveners' appellate brief . . .*

Id. (emphasis added).

Third, it was Interveners—and *only* Interveners—who argued that the Court of Appeal had the power to resolve this case on its merits, as a matter of law,

without further proceedings in this Court; the Court of Appeal accepted this invitation. *Field*, 199 Cal. App. 4th at 352-53.

And finally, though the Secretary vigorously defended this action, Plaintiffs have argued, almost from the first day of this litigation, that the Secretary of State made several "binding" admissions regarding the unconstitutionality of Proposition 14. *See, e.g.,* Plaintiffs' Reply in Support of Preliminary Injunction, filed Sept. 7, 2010, pp. 4-5. Interveners did not agree with Plaintiffs' characterization of those statements, but such "admissions"—if credited—would have undermined the Secretary's ability to defend Proposition 14. This, too, made it necessary for the measure's proponents to participate in this action.

The "necessity" of Interveners' participation is made all the more clear in this case by the California Supreme Court's recent ruling that "participation by the official initiative proponents [in litigation challenging the measure's validity] enhances both the substantive fairness and completeness of the judicial evaluation of the initiative's validity and the appearance of procedural fairness that is essential if a court decision adjudicating the validity of a voter-approved initiative measure is to be perceived as legitimate by the initiative's supporters." *Perry v. Brown*, 56 Cal. 4th 1116, 1151 (2011).

Movants also satisfy the "financial burdens of private enforcement" prong. Intervener-Defendants have incurred more than $300,000 in attorneys' fees to litigate this action, yet "there is no direct pecuniary benefit to [Intervener-Defendants] in the judgment." *Galante Vineyard v. Monterey Peninsula Wat. Mgmt. Dist.*, 60 Cal. App. 4th 1109, 1127 (1977). Rather, Interveners joined this action to vindicate non-pecuniary interests in the good governance of California. *See generally* Decl. of David Takashima In Support of Intervention, filed Aug. 17, 2010; Decl. of Allan Zaremberg In Support of Intervention, filed Aug. 17, 2010. "The financial burdens on [Movants] of litigating this matter unquestionably outweighed the organization's ideological interest in implementing the voters' will.

Numerous cases have concluded that ballot measure proponents, with no financial or personal interests at stake, qualified for section 1021.5 fee awards in actions brought to enforce those measures or qualify them for the ballot." *Stewart*, 126 Cal. App. 4th at 90. *See also County of San Luis Obispo v. Abalone Alliance*, 178 Cal. App. 3d 848, 868 (1986) (because parties motivated by political as well as economic goals, legal victory transcended personal economic interest in the litigation).

D. <u>The Amount Of Fees Requested Is Reasonable</u>.

Movants' fee request is reasonable and commensurate with the nature of the issues in the case, the stakes if Plaintiffs were to have prevailed, and the extensive briefing required by the tenacious, and even unreasonable, manner in which Plaintiffs prosecuted this action. Once attorneys' fees are found to be warranted under section 1021.5, the amount of the award is calculated by the lodestar adjustment method set forth by the Supreme Court in *Serrano III*, 20 Cal.3d at 48-49. The lodestar calculation is the product of the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate for each attorney. *See e.g., Press*, 34 Cal. 3d at 322. Fees are to be awarded for all hours reasonably spent in furtherance of the litigation. *Serrano IV*, 32 Cal. 3d at 639.

Regarding the hours spent, this case visited every level of the State's judicial system that it could have—this Court, on a motion for preliminary injunction; the Court of Appeal on a petition for writ of mandate <u>and</u> a regular appeal; the California Supreme Court on a writ of mandate; and then extensive (and unwarranted) post-remand proceedings in this Court as well. The proceedings at every level of the court system required extensive research and briefing, including opposing several motions to intervene in the Court of Appeal, the Supreme Court and again in this Court on remand.[12] *See* Skinnell Decl., ¶¶ 8-14.

[12] Fees incurred in successfully opposing intervention are compensable. *See Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1089 (9th Cir. 2003).

These briefing costs were increased by Plaintiffs' litigation tactics. For example, Plaintiffs' motion for a preliminary injunction failed to *even cite* controlling case law (*Libertarian Party v. Eu,* 28 Cal. 3d 535 (1980)), and their reply papers in support of that motion misrepresented the legislative record relating to SB 6, by selectively citing the Senate analyses of SB 6 (which was silent as to the effect of the write-in provisions), while ignoring the Assembly analyses that affirmatively stated that write-in voting at the general election was prohibited—the position taken by Interveners. Plaintiffs' game-playing necessitated the filing of a sur-reply and supplemental request for judicial notice in opposition to Plaintiffs' motion for preliminary injunction. *See* Skinnell Decl., ¶ 13(d).

Similarly, though the Court of Appeal decided this case on the merits as a matter of law, Plaintiffs engaged in extensive post-remand proceedings in a futile attempt to avoid the inevitable entry of judgment. They supported Linda Hall's motion to intervene to raise new claims, and then—when that motion failed—sought to amend the complaint to add those claims. *Id.* (Ironically, it was Interveners who sought to cut the litigation short, by inviting the Court of Appeal to decide the case on the merits.)

Regarding hourly rates, Movants are entitled to be compensated for attorneys' fees at rates that reflect the reasonable market value of attorneys' services in the community. *Serrano IV*, 32 Cal. 3d at 642; *San Bernardino Valley Audubon Society v. County of San Bernardino*, 155 Cal. App. 3d 738 (1984). The rates claimed in this case are based on rates that private firms charge in the San Francisco Bay Area for the kind of work done in this case, and are the rates that Nielsen Merksamer was actually paid for its work on this litigation; the firm charged these rates to other paying clients for similar work as well. *See* Skinnell Decl., ¶ 11. These actual rates are presumed to be reasonable. *See Guzman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) ("the best measure of the cost of an attorneys' time is what the attorney could earn from paying clients. *For a busy*

attorney, this is the standard hourly rate." (emphasis added)); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir. 2007) ("[B]illing rates 'should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity.'" (quoting *Davis v. City of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992)).

In this case, Movants are seeking the reasonable market value of the services provided by their attorneys with respect to these proceedings, and *actually paid* to those attorneys. The fees charged are $199,854.00—two-thirds of $299,781.00, calculated as the product of the attorney time spent and the market rates paid by Intervener-Defendants. *See* Skinnell Decl., ¶ 10. In addition, Movants are entitled to attorneys' fees for bringing this fee motion. The time accrued in support of the motion in February 2012 is included in the figure provided above. Movants will provide a summary of March time in their reply papers.

Case law under section 1021.5 also provides that successful parties may be awarded a "multiplier" of their fees based on—among other things—the excellent results obtained, the significant benefit to the public of the victory, and the particular skill and expertise brought to the case by the successful party's counsel. *See Serrano III*, 20 Cal. 3d at 49 (1977). Though Movants believe that they would be entitled to a multiplier under that case law, they do not seek to be awarded more than the fees that they have incurred in prosecuting this action, but seek only to be made whole.

E. <u>In The Alternative, Movants Are Entitled To Attorneys' Fees Under The Equitable Private Attorney General Doctrine.</u>

The equitable private attorney general doctrine is also a separate basis for awarding petitioners their fees in this case. *Serrano III*, 20 Cal. 3d at 43; *Coalition for Economic Survival v. Deukmejian*, 171 Cal. App. 3d 954, 960 (1985) (codification of the California private attorney general doctrine did not eliminate

the judiciary's equitable authority to award fees). California courts have inherent equitable authority to award fees under this doctrine to litigants who successfully pursue public interest litigation that vindicates important constitutional rights. *Serrano III*, 20 Cal. 3d at 46 (awarding fees on an equitable basis to two public interest law organizations for securing a decision that the state's school financing system violated the California Constitution's equal protection guaranty); *see also Best v. California Apprenticeship Council*, 193 Cal. App. 3d 1448, 1462 n.12 (1987).

III. CONCLUSION.

For all of the foregoing reasons, Movants respectfully requests that the Court grant their motion for attorneys' fees, and order Plaintiffs to pay the amount of $199,854.00.

Respectfully submitted,

Dated: March 27, 2012

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: _____
Christopher E. Skinnell
Attorneys for Intervener-Defendants

PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of 18 and not a party to the within cause of action. My business address is, 2350 Kerner Boulevard, Suite 250, San Rafael, California 94901.

On March 27, 2012, I caused the foregoing document described as **INTERVENER-DEFENDANT CALIFORNIANS TO DEFEND THE OPEN PRIMARY AND INDEPENDENT VOTER PROJECT'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF [C.C.P. § 1021.5]** to be served on the individuals listed below as follows:

See attached Service List	

x **BY U.S. MAIL:** By following ordinary business practices and placing for collection and mailing at 2350 Kerner Blvd., Suite 250, San Rafael, California 94901 a true copy of the above-referenced document(s), enclosed in a sealed envelope; in the ordinary course of business, the above documents would have been deposited for first-class delivery with the United States Postal Service the same day they were placed for deposit, with postage thereon fully prepaid.

Executed in San Rafael, California on March 27, 2012. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Paula A. Scott

Paula A. Scott

Field, et al. v. Bowen, et al.
No. CGC-10-502018

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