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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE, CIVIL DIVISION

RICHARD P. MCKEE, VISALIA NEWSPAPERS, INC., and CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, Petitioners/Plaintiffs, v. TULARE COUNTY BOARD OF SUPERVISORS, Respondent/Defendant.	Case # 10-236639 NOTICE OF MOTION AND MOTION FOR ATTORNEY FEES AND COSTS; POINTS AND AUTHORITIES; REQUEST FOR JUDICIAL NOTICE **[GOVT. §54960.5]** DATE: October 25, 2010 TIME: 8:30 A.M. DEPT: 1

Please take notice that on October 25, 2010, at 8:30 a.m., or as soon thereafter as the matter may be heard in Department 1 of the above-entitled court, the Court shall hear the Respondent TULARE COUNTY BOARD OF SUPERIVISORS Motion for Attorney Fees and Costs. This motion is made pursuant Government Code §54960.5 and is based on this Notice, on the Memorandum of Points and Authorities filed herewith, on the record, and

upon any such further oral or documentary evidence that may be presented to the Court at the time of the hearing.

DATED: September __, 2010

Respectfully Submitted,

KATHLEEN BALES-LANGE
Tulare County Counsel

By ________________________________
JULIA LANGLEY
Deputy County Counsel
Attorneys for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

I. Summary of Case

Beginning in January 2010, the Visalia-Times Delta ("VTD") began publishing a series of articles, available online and in print, about the Tulare County Board of Supervisors ("Board"). (The Court is requested to take Judicial Notice of these articles, attached to petitions filed in this matter.) These articles began fairly objectively but rapidly became harshly critical of the Board eating lunch together. Headlines insinuating the Board had engaged in wrongful conduct became the order of the day. Eating lunch was taken by the VTD and turned into "secret meetings," without any factual basis to support this characterization.

Based solely on these articles, Richard P. McKee ("McKee") sent the Board a Demand for Correction of Brown Act Violations letter. McKee is a self-styled expert on the Brown Act and sits on the Board of CalAware, an organization dedicated to open government. The Board Chairman responded to McKee on March 5, 2010, by letter, wherein he summarized the topics of discussions during lunch and informed McKee that, "These are work-related matters, but not within the scope of the Brown Act." Chairman Worthley represented to McKee that, "No member of this Board of Supervisors has committed a violation of the Brown Act."

McKee filed a petition for writ of mandate on March 11, 2010. CalAware did not join in the petition. McKee's filing was widely covered by the VTD which, through its parent corporation joined McKee as a petitioner along with a newspaper association. The first amended petition was filed on April 9, 2010.

The Chairman's response letter was used as an exhibit to the petition as "evidence" of the Board's admission to Brown Act violations. Relied on and submitted as evidence were the series of newspaper articles published by the VTD.

The Board demurred to the first amended petition on May 10, 2010, asserting that the petition failed to allege facts to sustain a cause of action for any violation of the Brown Act. After reviewing of the exhibits and verifications submitted in support of the petition, this Court agreed, issuing a tentative ruling sustaining the demurrer. On June 30, 2010, counsel

for petitioners presented oral argument to the Court, which was not persuasive. (The Court Order adopted June 30, 2010 is attached hereto as Exhibit A.)

The court sustained the demurrer with leave to amend. In its decision, the court stated in part:

> "Here, the essential allegations of the petition are that the lunch meeting discussions concern official activities of individual supervisors, travel planning, and management of individual supervisor's offices. **Plainly, these topics as presently stated involve individual supervisorial activities and are not items of importance concerning collective decision making related to the public's business**.
>
> Petitioners fail to allege facts showing that any type of policy making discussions affecting the general public or having to do with the county's governmental interest have taken place.
>
> **Thus, the court sustains the demurrer with leave to amend, for petitioners to allege, if possible, facts demonstrating that the Board engaged in conduct that violated the Brown Act."** (Emphasis added.)

At that time, it should have been clear to the petitioners that their allegations of violations of the Brown Act were insufficient as a matter of law. Petitioners did not file a motion for reconsideration of the Court's ruling.

On July 20, 2010, the petitioners filed their second amended petition for writ of mandate. The petitioners admitted this document was virtually a duplicate of the first amended petition. Paragraphs referencing the VTD newspaper articles removed that language and presented what the VTD had reported on as if it had been personally witnessed. There were no substantive changes to the petition, other than a meritless allegation regarding a supposed admission. In its Order, the Court noted "Petitioners acknowledge that, except for some changes in wording, the only change in the second amended petition is the inclusion of a statement made by the Board's counsel in its reply brief to petitioner's opposition to demurrer to the first amended petition." (The Court Order adopted August 23, 2010, attached hereto, as Exhibit B)

Through this filing, the petitioners essentially requested the Court reconsider its prior

ruling and elaborated on their previous arguments in more detail. The Court declined, stating: "As with the first amended petition, as a matter of law, the second amended petition also fails to allege sufficient facts to show a violation of the Brown Act."

Again, the Board demurred and the Court agreed. The Court sustained the demurrer without leave to amend finding that the petitioner's did not state sufficient factual allegations to support a claim for violation of the Brown Act despite having been provided with an opportunity to do so. The Court stated: "**In sum, petitioners' second amended petition is based on speculation and unreasonable inferences**." (Emphasis added.)

It is the Board's position that McKee's initial filing – based solely on newspaper articles as well as receipts – was unreasonable, clearly insufficient as a matter of law, and therefore frivolous. Joining the amended petition were those charged with fair and accurate reporting of newsworthy facts or events to the public who should have known better than to rely on supposition and innuendo. The Board believes that the filing of the first amended petition was also frivolous. Then, the re-filing of essentially the same petition took advantage of the Court's granting the petitioners leave to amend and had no reasonable, factual basis on which to file, making the second amended petition clearly frivolous and without any merit. Both attorney fees, at the market rate, and costs of defense for all the petitions should be awarded to the Board.

II. Argument

A. The Court has Authority to Award Attorney Fees and Costs to the Board.

A court may award court costs and reasonable attorney fees to a defendant in any action brought pursuant to Section 54960 or 54960.1 where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit. (CA Govt. Code §54960.5.) "Frivolous" as used in the legal profession, is defined as "clearly lacking in substance, clearly insufficient as a matter of law." (Barron's Law Dictionary, citations omitted.)

In the case at bar, the petitioners made two failed attempts to properly state a claim for violations of the Brown Act. The Board's first demurrer was sustained with leave to amend on June 30, 2010. The Court found that, "the petition fails to allege sufficient facts

to state a cause of action because **the present allegations stated, as a matter of law, fail to show a violation of the Brown Act.**" (Emphasis added.)

As a matter of law, the first amended petition was clearly insufficient. This failure to state facts sustaining a cause of action was clear, and provides the basis for the award of attorney fees and costs.

The second demurrer was also sustained without leave to amend on August 23, 2010. The Court found that, "As with the first amended petition, as a matter of law, the second amended petition also fails to allege sufficient facts to show a violation of the Brown Act" The Court further found that, "petitioner's second amended petition is based on speculation and unreasonable inferences."

The Court's ruling provides the basis to find that the second amended petition was also clearly insufficient as a matter of law. For the reasons set forth below, Petitioners' entire action was frivolous and lacking in merit. As such, Respondent is entitled to attorney fees at the market rate.

B. Petitioners' Entire Action for Violation of the Brown Act Was Without Merit

Government Code §54960.5 provides that a defendant may recover reasonable attorney fees and costs after prevailing on an action brought pursuant to §54960 when the court finds that the action was clearly frivolous and lacking in merit.

1. The petition and first amended petition were frivolous.

As early as March, 2010, McKee was on notice that the only persons asserting a violation of the Brown Act had occurred were reporters for the VTD who based their assertions on false logic and speculation. By that time, the Board Chair had responded to McKee's demand letter, and clearly set forth the topics discussed when some of the Board members ate lunch together in public restaurants.

As an expert in these matters, McKee knew or should have known that he needed specific, articulable facts to sustain his allegations. Certainly, his counsel should have known this. Both he and his counsel were on notice that these items were not matters contemplated by the Brown Act. Both he and his counsel are experienced in this area of law. In spite of this knowledge, McKee continued to pursue litigation, along with the parent

corporation for the VTD and the newspaper association.

In *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, an action was brought against the city, members of the city council, mayor, city attorney and their outside counsel alleging violations of the Brown Act. As in the instant case, the petitioner had submitted a written demand requesting correction of the alleged illegal action. The city rejected the petitioner's claim. The petitioner then filed a complaint alleging violations of the Brown Act. The respondents' demurred. The trial court sustained the demurrer and awarded costs and attorney fees.

On appeal, the Court found that the trial court had correctly sustained the demurrer finding that the complaint had failed to state a cause of action. The court analyzed the language of §54960.5 and opined that prior to imposing a monetary penalty, the court should be required to set forth a factual basis for the award. The court reversed the order and remanded "for the trial court to reenter its order with adequate justification in a manner consistent with this opinion." (*Id* at page 1121.)

In this case, the petitioners pursued this matter after having been advised that such topics did not fall within the Brown Act. Their experience in this area of law supports a finding that they had the legal background and expertise to know that their allegations were insufficient, as a matter of law. The court found that, "the petition fails to allege sufficient facts to state a cause of action because the present allegations stated, as a matter of law, fail to show a violation of the Brown Act." (Emphasis added.) The public funds used to defend this meritless action - reasonable costs and attorney fees – should be awarded to the Board.

2. The second amended petition was clearly frivolous.

The order of June 30, 2010 set out the Court's reasons for sustaining the first amended petition and defined the parameters for amending and refiling the petition. The court granted leave to amend, "for petitioners to allege, if possible, facts demonstrating that the Board engaged in conduct that violated the Brown Act." (Emphasis added.) Petitioners had the option of filing nothing, in which case the matter would have been dismissed. The second amended petition was filed on July 20, 2010.

In what can only be described as "thumbing its nose" at the court's order, the petitioners filed virtually the identical petition, ignoring the court's order to allege facts that would demonstrate conduct that violated the Brown Act. The Board filed its second demurrer on the same basis as previously argued. In its order of August 23, 2010, the court, for the second time, sustained the demurrer, this time without leave to amend, due to the Petitioners inability to "state sufficient factual allegations to support a claim for violation of the Brown Act despite having been provided with an opportunity to do so."

Prevailing defendants can recover fees only where plaintiff's claim was "clearly frivolous, and totally lacking in merit. (Govt. Code § 54960.5.) The filing of the Second Amended Petition which asserts the same factual allegations as the previous petition is undoubtedly an action that is clearly frivolous and lacking in merit. As an action to ostensibly pursue a fair result for the taxpayers, such a deliberate action is doubly egregious: It has wasted the taxpayer's resources to force the Board to defend two petitions, both of which clearly had no legal basis on which to prevail.

The Board should be awarded reasonable costs and attorney fees at the market rate.

C. Attorney Fees Should Be Awarded At the Reasonable Market Rate

Case law supports calculation of fees at the market value for publicly funded attorneys. "Determining a reasonable market rate does not depend on the source or amount of funding for the successful attorney." (*Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d. 621.) The private attorney general statute is analogous to the Brown Act's attorney fees provision in that both authorize compensation for private actions which serve to vindicate important rights affecting the public interest. (*Serrano v. Unruh, supra*, 32 Cal.3d at p. 632; *Common Cause v. Stirling*, (198) 147 Cal.App.3d 518, 524.) In *Common Cause*, a case involving attorney fees under the Brown Act, the court was guided, *inter alia*, by decisions involving fees under the private attorney general theory. (*Common Cause, supra*, 147 Cal.App.3d at p. 522, citing *Marini v. Municipal Court* (1979) 99 Cal.App.3d 829 and *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917.) Therefore, the rationale for basing an award of attorney fees on reasonable market value is equally

applicable to section 54960.5. (*International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (App. 2 Dist. 1999) 69 Cal.App.4th 287, 303, modified on denial of rehearing, review denied.)

The court is not required to base the attorneys' fee recovery to actual costs. The Board requests an award of attorney fees and costs at the market rate.

The Board has incurred actual costs in the amount of $331.50 for the cost of serving documents on the parties, and public attorney fees in the amount of $31,938.60, totaling a cost of $ 32,270.10 (Memorandum of Costs Summary & Cost Worksheet, attached hereto as Exhibit C). The Board will be requesting the Court recalculate the public attorney fees using a lodestar amount.

III. Conclusion

The Board requests this Court issue an order finding that the Petition, First Amended Petition and the Second Amended Petition filed in this action were frivolous and lacking in merit, and award attorney fees and costs calculated at the market rate for such legal services.

DATED: September __, 2010

Respectfully Submitted,

KATHLEEN BALES-LANGE
Tulare County Counsel

By ________________________________
JULIA LANGLEY
Deputy County Counsel
Attorneys for Respondent

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