Case Nos. A135335 & A136212

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION FIVE

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Plaintiff, Respondent, and Cross-Appellant,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT,

Defendant and Appellant.

On Appeal From the Superior Court of Alameda County
(Case No. RG10548693, Hon. Frank Roesch, Judge)

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT BAY AREA AIR QUALITY MANAGEMENT DISTRICT; PROPOSED BRIEF

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TO THE HONORABLE BARBARA J.R. JONES, PRESIDING, PRESIDING JUSTICE OF THE FIRST DISTRICT COURT OF APPEAL, DIVISION FIVE:

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities and the California State Association of Counties ("*Amici*") respectfully apply for permission to file the accompanying brief *amicus curiae* in support of Appellant the Bay Area Air Quality Management District. The brief has been prepared and is submitted concurrently with this application.

INTEREST OF *AMICI*

The League of California Cities ("League) is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance. The League appears frequently before the courts of appeal and Supreme Court as *amicus curiae* on matters affecting local government.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties.

CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

AMICI ARE FAMILIAR WITH THE ISSUES IN THIS CASE

Amici and its counsel are familiar with the issues in this case, and have reviewed the orders of the Superior Court and the briefs on the merits filed with this Court. As statewide organizations with considerable experience in this field, the League and CSAC believe they can provide important perspective on the issue before the Court. Counsel in this case for *amici* has represented public agencies in environmental and land use litigation, including motions for attorney fees under Code of Civil Procedure section 1021.5.

POINTS TO BE ARGUED BY *AMICI*

If permission to file the accompanying brief is granted, the League and CSAC will address the following issue:

> May attorneys for a trade association funded by the profits of its members recover attorney fees under Code of Civil Procedure section 1021.5 after prevailing in a lawsuit that conferred a financial benefit on the trade association's members?

The League and CSAC will urge the Court to reverse the decision of the Alameda County Superior Court.

Wherefore, the League of California Cities and the California State Association of Counties respectfully request this Court to grant this application to file the accompanying brief *amicus curiae*.

Dated: March 5, 2013

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PROPOSED BRIEF *AMICUS CURIAE* OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANT BAY AREA AIR QUALITY MANAGEMENT DISTRICT

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Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities and the California State Association of Counties (collectively, "*Amici*") respectfully submit this brief *amicus curiae* in support of Appellant the Bay Area Air Quality Management District ("District").

I.

INTEREST OF *AMICI*

The League of California Cities ("League) is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance. The League appears frequently before the courts of appeal and Supreme Court as *amicus curiae* on matters affecting local government.

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Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

II.

POINT TO BE ARGUED BY *AMICI*

> May attorneys for a trade association funded by the profits of its members recover attorneys' fees under Code of Civil Procedure section 1021.5 after prevailing in a lawsuit that conferred a financial benefit on the trade association's members?

A successful plaintiff may be awarded attorneys' fees under Code of Civil Procedure section 1021.5[1] only if:

1. the action resulted in enforcement of an important right affecting the public interest;

2. the action conferred a significant benefit on the general public or large class of persons; and

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[1] Code of Civil Procedure Section 1021.5(a) provides:

> 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. …

3. the necessity and financial burden of private enforcement are such as to make the award appropriate.

(*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 317–18; *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933-34 ("*Woodland Hills*"); *DiPirro v. Bondo* (2007) 153 Cal.App.4th 150, 197.)

It is the plaintiff's burden to satisfy all three of these criteria, and if even one remains unproven the request for attorney fees must fail. (*County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 648; *Beach Colony II Ltd. V. California Coastal Comm'n* (1985) 166 Cal.App.3d 106, 113 ("*Beach Colony*").)

In this brief, *Amici* focus solely on the last element: whether the burden of private enforcement transcended the plaintiff's stake. (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 30 (to show that the necessity and financial burden of private enforcement makes an award of fees appropriate, a plaintiff must show that the litigation costs transcended its personal financial interests).)

As we explain below, the plaintiff trade association in this case does not meet this requirement because it is a creature of, and was acting solely on behalf of, entities that *do* have a more-than-sufficient financial stake in the outcome of the underlying litigation to have shouldered the cost of litigation.

III.

STATEMENT OF FACTS

Amici adopt the statement of facts in the opening brief of the District. As a supplement, *Amici* also include the following facts material to the argument presented in this brief.

Respondent California Building Industry Association ("BIA") describes itself as a "trade association representing roughly 3,200 member companies involved in residential and light commercial construction including homebuilders, trade contractors, architects, engineers, designers, suppliers and other industry professionals." (Clerk's Transcript ("CT") 4:1805 at ¶ 63.) Its members include many, if not all, of the major builders in the Bay Area and California, including Pulte Homes, Toll Brothers, D.R. Horton, and Signatures Homes, all of whom have projects that have been the subject of environmental review relying on the air quality thresholds that were the subject of this litigation. (Joint Appendix ("JA") 1:211 at ¶ 16; 2:221-40; 2:215.75-.129; 1:211 at ¶ 18, 215.16.)

In 2010, BIA challenged the District's adoption of air quality thresholds of significance ("Thresholds") designed to assist local agencies in their review of air quality impacts under the California Environmental Quality Act. ("CEQA") (CT 1:1-23.) BIA challenged the Thresholds on several grounds, and asked the trial court to invalidate them. (CT 1:1-23.) In the end, the court found for BIA on only one issue, specifically whether

the adoption of the Thresholds was a "project" as that term is defined by CEQA. (CT 7:1901-04, 8:2243-44.)

BIA then filed a motion seeking $800,774.37 in attorney fees under Code of Civil Procedure section 1021.5 ("Section 1021.5"). (JA 2:264.) The trial court awarded BIA $422,293.75. (JA 2:363-71.)

IV.

ARGUMENT

A. A TRADE ASSOCIATION FUNDED BY ITS MEMBERS MAY NOT RECOVER ATTORNEYS' FEES UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5 WHEN ITS MEMBERS' FINANCIAL STAKE WAS MORE THAN SUFFICIENT TO PURSUE THE LITIGATION.

In this case a building industry trade association funded by its members recovered attorney fees under the private attorney general statute for overturning thresholds for measuring the impacts of airborne contaminants that—as illustrated by evidence that the association itself put before the court—would have dramatically increased the cost of development for its members. If ever a case called for the Court to return to first principles with respect to the private attorney general theory this would be the one.

What is the purpose of the "private attorney general" theory, as codified in Section 1021.5?

> .... the fundamental objective of the private attorney general doctrine of attorney fees is "'to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees

> . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens.'" The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, *without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.*

(*Woodland Hills*, *supra*, 23 Cal.3d at 933, citations omitted, emphasis added; *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1217-1218 ("*Whitley*").)

In a nutshell, the private attorney general theory is intended to make important public interest litigation that would otherwise be unaffordable possible. It is *not* intended to "reward for litigants motivated by their own interests who coincidentally serve the public." (*California Licensed Foresters Association v. State Board of Forestry* (1994) 30 Cal.App.4th 562, 570 ("*California Licensed Foresters*"), citing *Beach Colony*, *supra*, 166 Cal.App.3d at 114; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1414.)

> What section 1021.5 does address is the problem of affordability of such lawsuits. Because public interest litigation often yields nonpecuniary and intangible or widely diffused benefits, and because such litigation is often complex and therefore expensive, litigants will be unable either to afford to pay an attorney hourly fees or to entice an attorney to accept the case with the prospect of contingency fees, thereby often making public interest litigation 'as a practical matter … infeasible.'

(*Whitley*, *supra*, 50 Cal.4th at 1219, *quoting Woodland Hills, supra*, 23 Cal.3d at 933.)

Fees may be awarded under the private attorney general theory only when necessary because the cost of public interest litigation to the plaintiff renders it "infeasible" as a practical matter.

> [S]ection 1021.5 is primarily concerned not with the problem of a litigant's lack of motivation to pursue public interest litigation but with the infeasibility of doing so because of large attorney fees and nonpecuniary outcomes that make "these cases ... prohibitively expensive for almost all citizens."

(*Whitley*, *supra*, 50 Cal.4th at 1224, citation omitted.)[2]

Section 1021.5 speaks directly to this requirement by requiring that "the necessity and financial burden of private enforcement... [be] such as to make the award appropriate." (Section 1021.5.) The "financial burden" part of this inquiry focuses not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. (*Whitley*, *supra*, 50 Cal.4th at 1215, *quoting Woodland Hills*, *supra*, 23 Cal.3d at 941.) Thus an award is "appropriate" only when the "cost of the claimant's legal victory transcends

---

[2] "Taken together, the policies underlying both the intervention and private attorney general statutes are designed to encourage interested parties who might otherwise lack the resources to aggressively pursue meritorious public interest litigation." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 88 [proponents of a ballot measure were entitled to fees as successful intervenors, because the financial burden of litigation significantly outweighed their interest in having the measure upheld].)

his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter." (*Woodland Hills*, *supra*, 23 Cal.3d at 941, citing *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89.)

Significantly for our purposes here, the Supreme Court recently clarified that a litigant's *nonpecuniary* stake *may not* be considered in this analysis. (*Whitley*, *supra*, 50 Cal.4th at 1211.) This highlights the focus of the private attorney general theory and Section 1021.5 on *pecuniary* costs and benefits to litigants seeking an award of attorneys' fees.

> Motivation language is particularly useful because in assessing the financial burdens and benefits in the context of section 1021.5, we are evaluating incentives rather than outcomes. "'[W]e do not look at the plaintiff's *actual* recovery after trial, but instead we consider "the estimated value of the case at the time the vital litigation decisions were being made."' [Citation.] The reason for the focus on the plaintiff's expected recovery at the time litigation decisions are being made, is that Code of Civil Procedure section 1021.5 is intended to provide an incentive for private plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation." [Citation.] Although objective financial incentives and subjective motives may overlap, and indeed sometimes may be indistinguishable, it is clear from the language and purpose of the statute that only the former is the proper subject of the court's inquiry when assessing the financial burden of litigation under section 1021.5.

(*Id.* at 1220-21 (emphasis added).)

At the same time, the fact that a litigant does not *seek* monetary damages is irrelevant. Courts need not "feign naiveté as to the plaintiff's

true purpose in bringing an action." (*Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1321 ("*Edna Valley Watch*").)

So what of the situation here, where a trade association, rather than its members themselves, brings the lawsuit?

In *California Licensed Foresters*, the plaintiff membership organization ("CLFA") prevailed in a challenge to emergency regulations adopted by the Board of Forestry, claiming that the emergency regulations affected the livelihood of its members. (30 Cal.App.4th at 567.) It then sought fees under Section 1021.5. The trial court awarded fees, but the court of appeal reversed.

Like the BIA here, "CLFA argue[d] it had no personal motivation for bringing this action because, as an entity separate from its members, CLFA had no financial stake in the outcome." (*Id.* at 570.) The court rejected this line of reasoning:

> These arguments are not persuasive. In its representative capacity, CLFA had a financial stake in pursuing this matter *to the same extent as its members*. CLFA's very existence depends upon the economic vitality of its members and any benefit or burden derived by CLFA from this lawsuit ultimately redounds to the membership. As to CLFA's financial status, our concern under section 1021.5 is whether CLFA "had an *individual stake* that was out of proportion to the costs of litigation ..., not whether [it was] financially able to bear the costs. Financial status is not the criterion...." (*Citizens Against Rent Control* v. *City of Berkeley* (1986) 181Cal.App.3d 213, 231 [226 Cal. Rptr. 265], citations omitted and italics in original.)

(*Id.* (emphasis added).) The Court concluded that the pecuniary interest of CLFA and its members was sufficient *motivation* for bringing the action and reversed the award of fees. (*Id.* at 573.)

Applying the same reasoning, the court in *California Redevelopment Association v. Matosantos* (2013) 212 Cal.App.4th 1457 ("*CRA*") recently reversed a fee award to a membership association of redevelopment agencies that prevailed in their challenge to legislation that reallocated property tax funding from redevelopment agencies to the state. (*Id.* at 1464.) As BIA attempts to do here (Respondent's Brief, at 71), the association argued that the court should look to the financial interests of the organization, and not its members, when assessing whether it had a sufficient financial incentive to bring suit absent an award of fees (*CRA*, *supra*, 212 Cal.App.4th at 1476). The court was not persuaded.

Looking to *California Licensed Foresters*, the court found that "CRA had a financial stake in this matter *to the same extent as its members*." (*CRA*, *supra*, 212 Cal.App.4th at 1480 (emphasis added).) And, looking behind the veil of the association to its individual members, the court concluded that the litigation "did not impose a burden on CRA and its members out of proportion to their individual stakes in the matter and, hence, CRA is not entitled to an award of attorney fees under Code of Civil Procedure section 1021.5." (*Id.*)

Similarly, in *Los Angeles Police Protective League v. City of Los Angeles* (1988) 188 Cal.App.3d 1 ("*Police Protective League*"), the court denied attorneys fees for a police union at the trial level, where the case only implicated its members interests and the union had ample resources to proceed, but upheld fees for work at the appellate level, where the case was expanded to vindicate interests of non-members and where legal costs exceeded benefits such that it would not have made sense to proceed without a bounty.

The court described the analytical process the trial court must follow:

> The trial court must first fix—or at least estimate—the monetary value of the benefits obtained by the successful litigants themselves… Once the court is able to put some kind of number on the gains actually attained it must discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome. …
>
> After approximating the estimated value of the case at the time the vital litigation decisions were being made, the court must then turn to the costs of the litigation…which may have been required to bring the case to fruition. …
>
> The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case.

(*Id.* at 9-10, cited with approval in *Whitley*, *supra*, 50 Cal.4th at 1215-1216.)

In short, it is well-established that where a plaintiff has financial interest in a case "is sufficient to absorb actual litigation costs and still provide an incentive to litigate," fees should not be awarded." (*Lyons v. Chinese Hospital Association* (2006) 136 Cal.App.4th 1331, 1353; see *Woodland Hills*, *supra*, 23 Cal.3d 917, 941; *Police Protective League*, *supra*, 188 Cal.App.3d at 9-10.) Likewise, the law is also clear that when the trial court is evaluating the financial interests of a membership association, it must look beyond the financial interests of the association and evaluate, from an objective standpoint, the financial interests of the association's members. (*California Licensed Foresters*, *supra*, 30 Cal.App.4th at 570; *CRA*, *supra*, 212 Cal.App.4th at 1480.)

B. THE TRIAL COURT'S RULING WAS ERROR BECAUSE IT FAILED TO OBJECTIVELY EVALUATE BIA MEMBERS' FINANCIAL STAKE.

BIA argued to the trial court, as it is arguing here, that its "motivation in bringing the lawsuit was to correct what it considered 'terrible' policy, and was not motivated by its own or its members' financial interests." (JA 1:12; *see* RT 6:23-28; *see also* Respondent's Brief, at 72.) Unfortunately, in its attempt to address the financial burden issue, the trial court failed to conduct the required objective analysis of BIA members' interests, and as a result got exactly wrong what this case was about:

> Here, the Court concludes that CBIA's interest in the litigation was about *policy* and not a financial benefit to either itself or its members.[3]

(JA 2:366; *see also* RT 28:7-17 ("I had the distinct impression that you were interested in public policy questions . . . it was the public benefit that motivated the petitioner and the incidental benefit to the members was just that, incidental.")

BIA's continued suggestion here that non-pecuniary interests could warrant an award of fees—regardless of the financial interests its client had pursuing the litigation—is a calculated mistake. (Respondent's Brief, at 71.) As BIA acknowledged in its papers below, when the court evaluates whether a litigant's financial interests preclude it from an award of fees under Section 1021.5, "[n]on-economic interests are irrelevant . . .." (JA 1:11.)

Entitlement to an award of fees under Section 1021.5 "does not turn on a balance of the litigant's private interests against those of the public but on a comparison of the litigant's private interests with the anticipated costs

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[3] "Of course, the public always has a significant interest in seeing that legal strictures are properly enforced and thus, in a real sense, the public always derives a 'benefit' when illegal private or public conduct is rectified. "[However]... the Legislature did not intend to authorize an award of attorney fees in every case involving a statutory violation. We believe rather that the Legislature contemplated that in adjudicating a motion for attorney fees under section 1021.5, a trial court would determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." (*Woodland Hills, supra*, 23 Cal.3d at 939–940.)

of suit." (*California Licensed Foresters*, *supra*, 30 Cal.App.4th at 570, citing *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113.)

In a tacit acknowledgement that its members' financial stake may disqualify it from receiving fees, BIA protests that a declaration from its general counsel is the "only evidence" of its members' financial interest at the time they filed suit. (Respondent's Brief, at 77.) The declaration states that BIA "placed no monetary value for itself or its members on a potential judgment that would require the [Thresholds] to be rescinded." (JA 1:176.) BIA cannot distance itself from its members' financial interests so easily.

Before it disavowed any knowledge of its members' financial interest in this suit (at the time of its fee motion), BIA submitted substantial evidence to the trial court indicating the profound financial consequences that the Thresholds would have on developers like its members.[4] (*See* CT 4:1079 at ¶ 40 ("tens of thousands of dollars in added cost, and possibly losing the ability to obtain financing"); CT 7:1977 ("$60,000 to $80,000 to analyze whether a [a single] . . . project[] complied with the Thresholds").)

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[4] BIA attempts to discount some of this evidence as only "included . . . to show that the Thresholds would push development from 'the urbanized environment and into greenfields,' and not that the Thresholds would cause a pecuniary injury to its members." (Respondent's Brief, at 80.) Significantly, BIA does not offer any authority for the proposition that its *motivation* for submitting this information is relevant to whether its members had a sufficient financial interest bring suit. There is none.

In fact, a declaration submitted by BIA prior to its fee motion states that the Thresholds would increase the cost of one development by "at least $600,000."[5] (JA 1:211 at ¶ 15.)

BIA argues that these statements of financial interest were not submitted by members of BIA, and that it is therefore "unclear" how they are relevant. (Respondent's Brief, at 80.) But after the decisions in *California Licensed Foresters* and *CRA*, no association will ever submit a declaration attesting to the financial impact that challenged regulations would have on one of its members.[6] Particularly where plaintiffs are represented by sophisticated counsel, their statements regarding the economic impact of regulation will always be carefully worded or they will *always* be submitted by similarly-situated non-member party – as was the case here. It *cannot* be so easy to qualify an otherwise ineligible trade association for fees.

BIA also attempts to divert attention from its members' financial stake by pointing out that "the petition does not allege any pecuniary

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[5] If only a handful of the 63 Bay Area builders that BIA claims as members were subject to this impact, and even if the value of their claims were discounted heavily because the likelihood of success were assumed to be slim, BIA would be ineligible for fees.

[6] As the District pointed out to the trial court, BIA's members include numerous large builders within the Bay Area that have projects subject to environmental review under the Thresholds. (JA 1:211 at ¶ 16; 2:221-40; 2:215.75-.129; 1:211 at ¶ 18.)

interest or seek a money judgment." (Respondent's Brief, at 74.) But the relief sought does not determine whether a plaintiff has sufficient financial stake in the outcome of the litigation to shoulder the burden of filing suit.

In *Edna Valley Watch*, the successful plaintiff similarly claimed that he had no pecuniary interest in the litigation because he had not sought monetary damages. The court rejected this claim, observing that the private attorney general theory and Section 1021.5 do not "require[] the court to confine its analysis to the relief sought on the face of the pleadings and to feign naiveté as to the plaintiff's true purpose in bringing an action." (*Id.* at 1321.)

Like the court in *Edna Valley Watch*, the trial court here should have refused to feign naiveté regarding BIA members' financial stake in the litigation, and undertaken the required objective analysis. To evaluate those members' financial interest, it was obligated to (1) "fix—or at least estimate—the monetary value of the benefits obtained by [BIA's members]" (2) "discount these total benefits by some estimate of the probability of success at the time vital litigation decisions were being made which eventually produced the successful outcome" and (3) "place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case." (*Los Angeles Police Protective League v. City of Los Angeles* (1988) 188

Cal.App.3d at 9-10, cited with approval in *Conservatorship of Whitley*, *supra*, 50 Cal.4th at 1215-1216.)

Here, BIA's own evidence clearly shows that its members had an objective financial interest in the litigation. It was BIA's burden to prove that the extent of that interest was sufficiently small that an award of fees was appropriate under Section 1021.5, and not the District's to prove the negative. (*County of Colusa v. California Wildlife Conservation Bd.*, *supra*, 145 Cal.App.4th at 648.) BIA failed to carry that burden. Further, BIA's own evidence reveals that if it had attempted to make the required showing, it would have failed.

C. THE TRIAL COURT'S REASONING LEADS TO RESULTS THAT WERE NEVER INTENDED BY THE LEGISLATURE AND CONTRARY TO THE FUNDAMENTAL PURPOSE OF SECTION 1021.5.

Surely, the drafters of Section 1021.5 did not intend it to authorize an award of fees to an industry trade group merely because they were clever enough, in the wake of *California Licensed Foresters* and *CRA*, to speak only of the financial burden to similarly-situated non-members. Rewarding this sort of ventriloquism is not what Section 1021.5 is for. Yet that is precisely what the trial court's ruling did here.

Stated bluntly, "Section 1021.5 'is clearly designed to encourage private enforcement of important public rights: true public-interest litigation conducted by protagonists who are truly private attorneys general

. . . the benefit provided [] must inure primarily to the public and be substantial . . .'" (*Terminal Plaza v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 837, citations omitted, emphasis in original.) That is simply not the case here.

V.

CONCLUSION

For the foregoing reasons, *amici* League of California Cities and California State Association of Counties urge the Court to reverse the decision of the trial court.

Dated: March 5, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionally double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software used to prepare this brief, this brief contains 5,057 words, including footnotes.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 5, 2013 at Oakland, California

By: _____

Matthew D. Visick
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES
and CALIFORNIA STATE
ASSOCIATION OF COUNTIES

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